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FILED

No. 00-669 OCT 23 2000

OFFICE OF THE CLERK

In The
Supreme Court of the United States

JENS SOERING,

Petitioner,

v.

**GEORGE DEEDS, Warden,
Keen Mountain Correctional Center,**

Respondent.

**ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

Petition for Writ of Certiorari

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QUESTIONS PRESENTED FOR REVIEW

1. DID THE FOURTH CIRCUIT ERRONEOUSLY INTERPRET §2254(e)(1) TO REQUIRE DEFERENCE TO A STATE TRIAL COURT'S FINDING THAT WAS NEITHER ADOPTED NOR APPROVED UPON FULL REVIEW BY THAT STATE'S APPELLATE COURT?

2. DOES A DEFENDANT LOSE HIS PROTECTION UNDER *EDWARDS v. ARIZONA* BY SIGNING A WAIVER OF HIS RIGHT TO HAVE COUNSEL PRESENT DURING AN INTERROGATION WHERE THE STATE PUTS ON NO EVIDENCE OF WHO INITIATED THE CONTACT LEADING TO THE WAIVER?

3. CAN A PROSECUTOR USE THE DEFENDANT'S ASSERTION OF HIS FOURTH AMENDMENT RIGHTS TO ARGUE FOR DEFENDANT'S GUILT, CONTRARY TO *GRIFFIN v. CALIFORNIA* AND THE FOURTH AND FOURTEENTH AMENDMENTS?

4. IS A STATE COURT DECISION CONTRARY TO SUPREME COURT PRECEDENT IN *BRADY v. MARYLAND* WHEN IT REQUIRES THE PETITIONER TO SHOW THAT "A JURY WOULD HAVE ENTERTAINED A REASONABLE DOUBT REGARDING PETITIONER'S GUILT" AND THUS WOULD HAVE ACQUITTED THE PETITIONER IF THE WRONGFULLY WITHHELD EXCULPATORY EVIDENCE HAD BEEN PRESENTED?

PARTIES TO THE PROCEEDING

The Petitioner is Jens Soering, an incarcerated prisoner in the Commonwealth of Virginia and the named Respondent is George Deeds, Warden of Keene Mountain Correctional Center. (Since the Fourth Circuit decision, Mr. Soering has been moved to the Brunswick Correctional Center also in the Commonwealth of Virginia.)

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The Fourth Circuit decision, reproduced at App. 1-11,[1] was by unpublished opinion referenced in the table at 217 F.3d 840 (4th Cir. 2000). The District Court opinion was unreported and is reproduced at App. 12-48. The state Supreme Court habeas decision on the *Brady* issue is reported as *Soering v. Deeds,* 255 Va. 457, 499 S.E.2d 514 (1998).

CONCISE STATEMENT OF BASIS FOR THIS COURT'S JURISDICTION

Judgment dismissing the Petition for Habeas Corpus was entered by the United States District Court for the Western District of Virginia on February 24, 1999 and affirmed after briefing and oral argument by the Fourth Circuit on June 30, 2000. Petitioner timely filed a Petition for Rehearing and Rehearing en banc which was denied by the Fourth Circuit on July 25, 2000. This Court has jurisdiction of this matter pursuant to 28 U.S.C. §§2241 and 2254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONSTITUTION - AMENDMENT IV

"The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated . . ."

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[1] "App." references are to the Appendix which follows this Petition.

U. S. CONSTITUTION – AMENDMENT V

"No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law . . ."

U.S. CONSTITUTION – AMENDMENT VI

"In all criminal prosecutions the accused shall enjoy the right . . .to have the assistance of counsel for his defense."

U.S. CONSTITUTION - AMENDMENT XIV

". . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . ."

ANTI-TERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 ("ADEPA")
28 U.S. CODE §2254(d)(1) and (e)(1)

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application_ of, clearly established Federal law, as determined by the Supreme Court of the United States . . .

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption by clear and convincing evidence."

CONCISE STATEMENT OF THE CASE

In 1990 Petitioner Soering was convicted of two counts of first degree murder and sentenced to two consecutive life sentences by a Virginia court. The victims of the multiple stabbing murders were the parents of Soering's girlfriend, Elizabeth Haysom. Both he and Ms. Haysom were at the time Echols Scholars at the University of Virginia. Ms. Haysom pled guilty to being an accessory-before-the-fact and after her conviction was a witness against Soering in his trial. At trial, Mr. Soering's and Ms Haysom's testimonies were the mirror images of one another with each claiming that the other had taken the rental car to Bedford and murdered Mr. and Mrs. Haysom, leaving the other one in Washington. D.C. There were no eye witnesses and the scant forensic evidence was insufficient to corroborate either story over the other. In fact, only Ms. Haysom's fingerprints were found at the crime scene.

After the murders, both Mr. Soering and Ms. Haysom were questioned by the police, along with many others, after the murders, but no charges were placed. During these voluntary interviews, Mr. Soering refused to volunteer forensic samples (hair, fingerprints, etc.) requested by the police. After several months, and, again, without any charges pending, Mr. Soering and Ms. Haysom fled to

Europe. While in custody in England on a check-cashing scam, both were interrogated by a Virginia investigator who flew to London in the hopes of getting material for an indictment. Ms. Haysom had counsel present for these interrogations, but Mr. Soering, despite an unequivocal request, was not provided counsel. Based on these interrogations in which Mr. Soering made incriminating statements in an attempt to divert suspicion from the real culprit, Elizabeth, indictments were secured of both parties and both were extradicted to the United States.

At trial, Mr. Soering testified he neither participated in the crimes nor had any foreknowlege of Elizabeth's criminal acts, which she confessed to him upon her return to Washington. There was no forensic evidence specifically identifying Mr. Soering as being at the scene of the crime. There were smeared, bloody sneaker prints which police said belonged to a "woman or a small boy;" Ms. Haysom's fingerprints were present on liquor bottles, and there were other fingerprints that never were identified, but none of the prints at the scene matched Mr. Soering's. Small spots of blood, too small to subtype, were found which matched Ms. Haysom's Type B blood (shared with 10% of the population) and Mr. Soering's Type O (shared with 45% of the population). The Type B blood was found in the kitchen sink on a damp cloth, near the body of Mrs. Haysom; the Type O blood was found in a master bedroom which did not appear to be a room in which the struggle had taken place. There were no eyewitnesses that placed Mr. Soering either at the scene or anywhere in the area.

Mr. Soering testified that he mistakenly believed that as a member of a German diplomatic family, if he confessed he would, at worst, be sent to Germany and tried there where the maximum penalty for anyone under 21 years of age is ten years. He was willing to make such a sacrifice for his girlfriend to save her from the death penalty in Virginia. Though his statements incriminated him, they included no

details that could not have been learned from the newspapers or from Elizabeth and in fact contained many factual errors (including how the female victim was dressed). Mr. Soering had no criminal history of any kind and was known not to drink or participate in the college drug scene. Ms. Haysom, in contrast, testified that she was a dope addict and had committed numerous criminal acts, including stealing her own mother's jewelry in order to supply herself with drugs.

The prosecutor, whose only witness to implicate Soering was a convicted felon about to come up for her first parole hearing, leaned heavily on the uncounseled confessions by Soering in England and also on his initial refusal to permit a suspicionless search of his body for hair, footprint, fingerprint and blood samples. (Later, after his arrest, those searches were of course carried out and turned up nothing of consequence as set forth above.)

In a post-conviction *Brady* hearing, it was determined that although the prosecutor had given the defense 267 "lead sheets," he had failed to disclose that two men were picked up in the area shortly after the crime, that they subsequently within a few days committed a stabbing murder in nearby Roanoke, and that there was evidence that when picked up in Bedford in the vicinity of the crime scene they had secreted a knife in the back seat cushions of the squad car which knife was by all testimony consistent with the unrecovered murder weapon. The defense's theory at trial was the Elizabeth Haysom had committed these murders probably with one or more accomplices. The Supreme Court of Virginia assumed such exculpatory evidence would have been admissible by the defense under Virginia law, but held there was no prejudice to its suppression by the prosecution.

DIRECT APPEAL

On direct appeal, the Court of Appeals of Virginia dismissed Soering's *Edwards* claim on the ground that the Fifth Amendment and the protections of *Edwards* did not

apply to Soering's interrogations by a Virginia investigator in London because they took place outside of the territorial United States. App. 18. (This ruling was later found by the U.S. District Court to be contrary to *United States v. Verdugo-Urquidez,* 494 U.S. 259 (1990). App. at 19-20.) The Court of Appeals also dismissed Soering's other appeal issues and the Virginia Supreme Court denied Soering's Petition for further review.

STATE HABEAS

Soering's trial counsel having been disbarred, new counsel (also counsel in this Petition) in 1996 filed a state petition seeking habeas relief for violations of *Edwards*, for violation of the right to effective counsel in not objecting to evidence and comments by the prosecutor relating to Soering's exercise of his Fourth Amendment right to refuse to submit to a suspicionless search and for recently discovered *Brady* violations. The State Supreme Court dismissed Soering habeas claims except for his *Brady* claim which they remanded to the Circuit Court for an evidentiary hearing. The State Supreme Court also turned down Soering's request for an evidentiary hearing on his claim of ineffective assistance of counsel. After the Circuit Court denied relief on the *Brady* claim, Soering successfully petitioned for review of that decision by the state Supreme Court. That court accepted review but also denied the *Brady* claim, albeit on a different analysis from the Circuit Court. That opinion is reported as *Soering v. Deeds,* 255 Va. 547, 499 S.E.2d 514 (1998).

FEDERAL HABEAS

The United States District Court held a hearing on cross motions for summary judgment on Soering's *Edwards* and *Brady* claims and a motion for an evidentiary hearing on Soering's claim of ineffective assistance of counsel. In a 41

page opinion, reproduced at App.12-48, the U.S. District Court found the state court's *Edwards* analysis "contrary to" clearly established Supreme Court law. App.19-20. Nevertheless, relying on a state trial court finding that was not adopted by the state court on appeal, the court denied the *Edwards* claim. The District Court mistakenly viewed petitioner's claim regarding prosecutorial comment on his assertion of his right to refuse to give physical evidence absence probable cause as a Fifth Amendment claim and denied it based on *South Dakota v. Neville,* 459 U.S. 533 (1983)(case involving no Fourth Amendment issue, but holding the taking of physical evidence is non-testimonial and does not involve the Fifth Amendment). The court also denied the *Brady* claim based on §2454(d)(1) and found no predicate violation of the Fourth Amendment to support Petitioner's ineffectiveness claim.

On appeal a panel of the Fourth Circuit affirmed the District Court. Their opinion is reproduced at App. 1-11.

All three claims are fully preserved and this Court has jurisdiction of this case under 28 U.S.C. §§ 2241 and 2254.

REASONS FOR GRANTING THE WRIT

SUMMARY OF ARGUMENT

The Fourth Circuit erred in interpreting §2254(e)(1) to require deference to a state trial court's finding that was neither adopted nor approved upon full review by the state appellate court. This ruling was in the context of a federal ruling that the state's appellate court decision was "contrary to clearly established federal law" under §2254(d)(1). The lower courts need guidance was to whether, when deference to a state court ruling is eliminated by a (d)(1) finding, it can be revived under (e)(1) by reliance on state court factual

findings that were never adopted or approved by the state appellate court.

The Fourth Circuit also erred in holding that the *Edwards* protections, established by an unequivocal request for counsel were lost when defendant, without counsel, signed a written waiver and the state put on no evidence as to who initiated the contact leading to the waiver.

This case also creates a split in the Circuits with respect to whether the prosecutor can use defendant's assertion of his Fourth Amendment rights not to submit to a suspicionless search to argue for his guilt before the jury. The Fourth Circuit erred in finding no Constitutional error in the prosecution's extensive reliance on Soering's refusal to submit body samples as evidence of his guilt. Such prosecutorial conduct is in violation of *Griffin v. California* and the Fourth and Fourteenth Amendments and is not within the parameters of permissible conduct recently enunciated by this court in *Portuondo v. Agard.* Acceptance of this case is necessary to give guidance on the proper scope of *Portuondo* and *Griffin* and to create a uniform federal rule for prosecutors with respect to commenting on defendants' assertion of their Fourth Amendment rights as evidence of their guilt.

Finally, the Fourth Circuit erred in failing to hold that the state court's *Brady* analysis was "contrary to" and/or "an unreasonable application of" the Supreme Court's own opinion in *Brady*. Because the state's articulated *Brady* standard (with the withheld evidence the jury "would have" had a reasonable doubt) is directly contrary to *Brady* itself, the federal court should not have given it deference under 28 U.S.C. §2254(d)(1).

I. THE FOURTH CIRCUIT'S DEFERENCE TO A STATE COURT TRIAL FINDING NEVER APPROVED OR ADOPTED BY THE STATE APPELLATE COURT IS AN ERRONEOUS MISINTERPRETATION OF 28 U.S.C. §2254(e)(1).

While in custody in England, Soering made incriminating statements in the ultimately successful attempt to save his girlfriend, Elizabeth, from a capital murder charge. As the District Court found, Soering made these statements after an unequivocal request for counsel which was never honored. App. 24. The Fourth Circuit's conclusion that the admission of these statements was not constitutional error is legally erroneous. The Court of Appeals reached this decision by deferring under AEDPA §2254(e)(1) to a factual finding by the trial court that Soering "initiated contact" with the interrogators thereby breaking the bright line of *Edwards* created by his earlier unequivocal request for counsel. (As shown below, petitioner also established by clear and convincing evidence that this finding was without support in the record.) Yet this trial court ruling was superceded by an appellate decision that did not adopt or approve the lower court's finding and that was itself found by the federal District Court to be "contary to established federal law, " under §2254(d)(1). In an issue of first impression, the Fourth Circuit interpreted 28 U.S.C. §2254(e)(1), nonetheless, to require deference to this ruling because it was never "expressly rejected" and thus to require the petitioner to show the error of this finding "by clear and convincing evidence."

In this case, the reviewing state appellate court declined the invitation to adopt the reasoning and factual findings of the trial court and, instead, ruled that *Edwards* was not applicable at all, a finding the federal district court correctly found to be "contrary to established Supreme Court precedent." This appears to be the first time a federal court

has used §2254(e)(1) to bootstrap deference to a state court ruling after finding the highest state reviewing court to have made a determination "contrary to clearly established federal precedent" under §2254(d)(1).

When a petitioner has established that a state court ruling is contrary to Supreme Court law under §2254(d)(1), AEDPA does not permit the federal court to go behind the final state's final judgment in the matter and give (e)(1) deference to unapproved lower court rulings. Lower court rulings not adopted or affirmed on appeal drop out of the "law of the case," and are not to be resurrected as rulings to which a federal court must give deference. It would be ludicrous to interpret ADEPA to require federal court deference to a state court ruling which an appellate court chose not to review or approve. The scheme of AEDPA, to the contrary, is affords deference only to factual findings that have been subjected to appellate review according to state law. Where, as here, the state appellate court bypasses that review, the federal court must be the court to afford meaningful appellate review to the defendant.

To interpret AEDPA as the Fourth Circuit has would totally insulate such state trial court findings from appellate review in any system – federal or state.

II. THE COURT OF APPEALS' HOLDING THAT THE GOVERNMENT CARRIED ITS BURDEN OF ERASING *EDWARDS* PROTECTION BY THE SOLE EVIDENCE OF A WRITTEN WAIVER OF COUNSEL IS CONTRARY TO *EDWARDS v. ARIZONA*

Petitioner established by clear and convincing evidence that the state trial record was devoid of support for the state trial court's finding of "initiation of contact" by the defendant. The trial court's holding that the mere production of a written waiver of the right to counsel itself establishes the essential element of "initiation" is in fact contrary to

Edwards v. Arizona, 451 U.S. 477 (1981) itself. To so hold is to reverse this Court's ruling in *Edwards* and return to the pre-*Edwards* rule which focussed on voluntariness and waiver, not on "initiation of contact." See *Edwards v. Arizona*, 451 U.S. at 489 (Justice Powell concurring).

The Court of Appeals accepted the District Court's finding that indeed Soering had established an *Edwards* "bright line" by proof of an "unequivocal request for counsel," but then accorded a "presumption of correctness" to the state trial court's finding that defendant subsequently lost that protection. App. 4. Both courts erred in finding that the record was sufficient to cause the defendant to lose his *Edwards* protection and to permit continued custodial interrogation without providing the counsel unequivocally requested. These uncounseled interrogations formed the basis for the indictments necessary for the defendant's extradition and then formed a keystone for the prosecutor's case at trial against the defendant.

The Court of Appeals relied on two items: one, is a hearsay statement that Soering said he wished to speak to the interrogators, a statement the district court correctly found to be admissible only for showing the motivation of the investigators in going to Soering's cell, and not for the truth of its assertion. App. 26, n.6. That leaves only one piece of evidence: a log entry, only six minutes before a nighttime interview commenced, in which Soering signed a waiver of his right to have counsel present.

If there is any clear teaching of *Edwards*, it is this: we are abandoning the prior rule that uncounseled incriminating statements are admissible so long as they are voluntary and the accused waives his previously, unequivocally asserted right to counsel. The log entry is a waiver, no more, no less. While Justice Powell and others in *Edwards* urged that such should suffice, this view was soundly rejected by the majority. The panel's application in this case perversely reinstates the minority view as the law. For whatever reason, the state failed to put on the witnesses

who could have testified as to who initiated the conversations that led to this "waiver." Without such evidence, the state has failed to carry its burden to show that it was the defendant, not the state, who initiated such contact. *Edwards* 451 U.S. at 485. To hold that a written waiver, even if voluntary, suffices to extinguish the bright line of *Edwards* protection is to erase nineteen years of Supreme Court precedent.

III. PROSECUTORIAL COMMENT ON DEFENDANT'S ASSERTION OF HIS FOURTH AMENDMENT RIGHT NOT TO SUBMIT TO A SUSPICIONLESS SEARCH IS CONTRARY TO THIS COURT'S DECISION IN *GRIFFIN v. CALIFORNIA*

The teaching of the U.S. Supreme Court in *Griffin v. California*, 380 U.S. 609 (1965) is clear: a prosecutor cannot use the defendant's assertion of his constitutional right to argue for that defendant's guilt. That is exactly what took place in this case. The prosecutor introduced evidence of Mr. Soering's assertion of his Fourth Amendment right not to submit to a suspicionless search for fingerprints, footprints, blood and hair samples. In fact, in these discussions, the Bedford police and Mr. Soering *repeatedly* discussed the lack of "probable cause," and the authorities repeatedly attempted to pressure him not to assert his right to refuse. (See, e.g., JA-737[2]: INVESTIGATOR: "We're trying to do this thing in a way . . .that won't get attention." SOERING: "The thing is . . . I've talked to a lawyer about this and as I understand it, there isn't really probable cause.")

At trial, the prosecutor put into evidence a transcript of Soering's refusals to submit to this voluntary, suspicionless search. And then, in both opening and closing,

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[2]"JA" cites are to transcripts found in the Joint Appendix filed in the Fourth Circuit.

the prosecutor repeatedly emphasized Mr. Soering's refusal *as evidence for a jury finding of guilt*:

> "[H]e comes down and talks to the police officers. . .what they want is a sample of his blood, his fingerprints, his footprints . . .well, the defendant won't provide that." [Pros. Opening, 6/4/90 at 162.]
>
> "Now we have moseyed around to the idea of getting Elizabeth's footprints . . .and her blood. . .Asked her for them, she gives them. But . . .you put that same question to Jens Soering here, he comes down to the Sheriff's Department with the intent of charming us country boys . . . and this man over here is talking about things like well I won't give you my footprint." [Pros. Closing, JA1071p-q]
>
> "So we mosey around to talking to Jens Soering and what does Soering want to do? He doesn't want to give any blood, he doesn't want to give any footprints. . .[N]o fingerprints or blood for him." [Pros. Closing; JA 1071 r-s]
>
> "The star witness in this case was Jens Soering by virtue of his conduct, by virtue of his refusal to give the samples . . ." [Pros. Closing; JA 1078c]
>
> "Well, we are coming on down, aren't we? And then you add some of his conduct, about how he was asked to give his blood samples and physical evidence. Elizabeth Hansom gave it, he would not." [Pros. Closing; JA 1078d]

The Fourth Circuit found that no Constitutional violation occurred because "the prosecutor's comments would still have been permissible as a means of impeaching Soering's credibility," citing *Portuondo.*

This abstruse and legally incorrect argument was never put forward by the state or any previous reviewing court, and with good reason. The fact is the prosecutor did not use this evidence to impeach credibility, but, as shown from the quotations above, as *direct evidence of guilt.* Although Mr. Soering took the stand, he did not deny refusing to consent to a voluntary body search. Such refusal is simply a fact that has no relevance either to Mr. Soering's credibility or to his guilt and a circumstance about which the jury has no legitimate reason to know at all. Without the prosecutor's improper use of this evidence (the prosecutor introduced transcripts of the interview and Soering's assertion of his right to refuse to submit voluntarily to such a search as part of his case-in-chief), there would be no need for Mr. Soering when he took the stand to testify about this refusal because it is not relevant to the substantive issues before the jury and would not have been covered on direct nor a proper subject of cross-examination.

The Fourth Circuit's reliance on this Court's recent decision in *Portuondo v. Agard,* 120 S.Ct. 1119 (2000) is misplaced. First, in *Portuondo* this Court noted that there the prosecutor was commenting on something the jury could see for itself (defendant's ability to hear prosecution witnesses prior to his testifying) and that such comment directly related to impeachment of credibility to which defendants who testify have traditionally been subject. In fact, this Court, distinguished *Griffin v. California,* 380 U.S. 609 (1965) on this very ground:

> "The prosecutor's comments in this case, by contrast [to *Griffin*], concerned respondent's credibility as witness, and were, therefore, in accord with our longstanding rule that when a defendant takes the stand, his credibility may be impeached and his testimony assailed like any other witness." 120 S.Ct. at 1125 (emphasis in original).

Here, commenting on Soering's refusal to submit to a suspicionless search has nothing to do with credibility and is something the jury would not otherwise know or be entitled to know. Its only effect – and the one strongly urged by the prosecutor to the jury – is to leave the impression with the jury that one who asserts his constitutional right to refuse to such a search *must be guilty*. Permitting such a costly penalty for the assertion of a Constitutional right is directly contrary to *Griffin* and cannot be squared with the rationale of this Court in *Portuondo v. Agard*, 120 S.Ct. 1119 (2000).

That such evidence was considered critical in leading the jury to a guilty verdict is demonstrated by the repeated emphasis the prosecutor placed on this particular piece of evidence in his closing argument to the jury (see quotations above). Clearly, such evidence was prejudicial[3] and was used by the prosecutor to give the jury a reason to find that the perpetrator was the accused, rather than Elizabeth Haysom, as the defense (with good reason) claimed.

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[3]The Court of Appeals used its erroneous holding that *Griffin* and *Portuondo* constitutionally permitted such prosecutorial comment as a predicate for their refusal to grant petitioner a hearing on his ineffectiveness claim. Under *Strickland v. Washington*, 466 U.S. 668 (1986) errors of defense counsel whose correction would have a "reasonable probability" of a different outcome constitute prejudice. Here, Soering's refusal to volunteer to this search absent probable cause, a refusal whose assertion was clearly grounded on his Fourth Amendment right to so refuse, was repeatedly hammered on by the prosecutor in his argument to the jury as a reason for them to return a verdict of guilty. See quotations supra.

This case, thus, squarely raises the issue left unanswered in *Portuondo* and that is whether *Griffin* is appropriately interpreted to prohibit a prosecutor's outright argument for a defendant's guilt based on that individual's assertion of a clear constitutional right. The Fourth Circuit's opinion clearly creates a conflict in the Circuits on this constitutional issue and also is in conflict with state courts analyzing this same constitutional issue. See e.g., *United States v. Thame,* 846 F.2d 200 (3d Cir. 1988) (comment by prosecutor in closing on refusal to consent to voluntary search was error); *United States v. Taxe,* 540 F.2d 961 (9th Cir. 1976), *cert. denied,* 429 U.S. 1040 (1977)(same); *Gomez v. State,* 572 So.2d 952 (Fla. App. 1990)("No comment on its exercise should be permitted to raise an inference of guilty if the Fourth Amendment right against unreasonable search and seizure is to be given its full meaning"); *Padgett v. State,* 590 P.2d 432 (Alaska 1979)(a person's Fourth Amendment right not to consent "would be effectively destroyed if when exercised it could be used as evidence of guilt").

IV. STATE COURT RULING -- THAT DEFENDANT HAS TO SHOW THAT THE JURY "WOULD HAVE HAD" A REASONABLE DOUBT AS TO DEFENDANT'S GUILT WITH THE *BRADY* EVIDENCE -- IS CONTRARY TO BOTH *BRADY* AND *KYLES* AND NOT ENTITLED TO DEFERENCE UNDER 28 U.S.C. §2254(d)

The Virginia Supreme Court having found that the evidence withheld by the prosecutor was exculpatory and having assuming its admissibility nevertheless denied Soering's *Brady* claim. In so doing, the state appellate court articulated a legally erroneous standard of prejudice in analyzing the effect to be given to the prosecutor's failure to disclose exculpatory, admissible evidence to the defense.

The state court's articulated standard was whether with the evidence the jury "would have entertained a reasonable doubt as to petitioner's guilt." *Soering v. Deeds*, 255 Va. 457, 499 S.E.2d 514 (1998):

> "In other words, a petitioner must show that when the case is evaluated in the context of the entire record, including the omitted evidence, a jury would have entertained a reasonable doubt regarding petitioner's guilt [citing the dissenting opinion in *Kyles v. Whitney*]." Id at 517.

In reviewing this claim, the Fourth Circuit Court of Appeals erroneously concluded: "[W]e cannot say that the Supreme Court of Virginia's rejection of Soering's Brady claim was 'contrary to' or 'an unreasonable application of' *Brady* or *Kyles*." App. 8.

Yet the standard stated by the Virginia court in its opinion is directly contrary to the holding in *Kyles v. Whitney*, 414 U.S. 419 (1995) and in *Brady v. Maryland*, 373 U.S. 83 (1963), which state that the standard is, instead, whether with the evidence there would have been a "reasonable probability" of a different outcome. The panel decision fails to correct the error of deference that the district court gave to the conclusion of the Virginia Supreme Court which conclusion was founded on a precedent contrary to established Supreme Court law. Moreover it fails to address an important issue – whether a state court decision articulating the wrong standard but citing the right cases is within the "safe harbor" of §2254(d) – an issue raised and briefed by both sides. The Fourth Circuit's analysis is in conflict with *Terry Williams v. Taylor*, 120 S.Ct. 1495, 529 U.S. ___ (2000) in which the United States Supreme Court rejected Virginia's argument that if its state court articulated two standards, one right and one wrong, their decision is still entitled to §2254(d)(1) deference.

The prosecution's evidence was already weak. Even Soering's contrived "confessions" have little probative value since he had access to information from the true perpetrator, Elizabeth, and made numerous significant mistakes in his statements. In such a close case, the additional evidence of the availability of known cutthroats with a weapon consistent with the one used in the murders to aid Elizabeth in the crimes had a "reasonable probability" of a different jury outcome, indeed the unrebutted evidence of an acknowledged criminal defense advocate, Dennis Dohnal, was that it "absolutely" had such a probability, JA 1137.

CONCLUSION

The Petitioner has been incarcerated since he was nineteen for a crime he did not commit. The verdict was obtained by the withholding of exculpatory evidence by the prosecutor which prejudiced Soering's defense, by the admission of uncounseled statements in violation of the bright line of *Edwards*, and by the prosecutor's unconstitutional comments on Soering's assertion of his Fourth Amendment right not to submit to a suspicionless search as evidence for the jury to find him guilty. We ask the Supreme Court to accept this case for full review of the important issues of Constitutional law and interpretation of AEDPA §2254(e)(1) and to give petitioner relief in order that justice may be done.

Respectfully submitted,
JENS SOERING, Petitioner

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UNPUBLISHED
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

JENS SOERING,
Petitioner-Appellant,

v. No. 99-6498

GEORGE DEEDS, Warden,
Keen Mountain Correctional Center,
Respondent-Appellee.

Appeal from the United States District Court
for the Western District of Virginia, at Roanoke.
Jackson L. Kiser, Senior District Judge.
(CA-98-361-R)

Argued: June 8, 2000
Decided: June 30, 2000
Entered: June 30, 2000

Before WILKINS and LUTTIG, Circuit Judges, and
Robert R. BEEZER, Senior Circuit Judge
of the United States Court of Appeals
for the Ninth Circuit, sitting by designation.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Gail Starling Marshall, Rapidan, Virginia, for Appellant. John H. McLees, Jr., Senior Assistant Attorney General, OFFICE OF THE ATTORNEY GENERAL, Richmond, Virginia, for Appellee. **ON BRIEF:** Mark L.

Earley, Attorney General of Virginia, OFFICE OF THE ATTORNEY GENERAL, Richmond, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See Local Rule 36(c).

OPINION

PER CURIAM:

Petitioner-appellant Jens Soering appeals from the district court's denial of his application under 28 U.S.C. § 2254 for a writ of habeas corpus. Soering claims, inter alia, that several of his confessions were obtained in violation of Edwards v. Arizona, 451 U.S. 477 (1981), and that the prosecution withheld material exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963). Because we conclude that the district court correctly upheld the Supreme Court of Virginia's rejection of these and other claims advanced by Soering, we affirm the district court's judgment denying Soering's application for a writ of habeas corpus.

I.

Soering was sentenced in 1990, in accordance with the jury's recommendations, to two consecutive terms of life imprisonment for the murders of Derek and Nancy Haysom. Five years earlier, the corpses of the Haysoms were found in their home, with their throats slashed and their torsos penetrated with multiple stab wounds. J.A. 1233-34; 1240-42 (autopsy reports). Soering, a German citizen, confessed to these murders in detail on several occasions following his arrest in England on unrelated check-fraud charges; he explained how he and Elizabeth Haysom, the victims'

daughter and Soering's former girlfriend, arranged for Elizabeth to provide him with an alibi while he killed her parents, and he demonstrated to authorities the manner in which he severed the main artery in each of his victim's necks. See, e.g., J.A. 154-58, 168, 847-48. Soering's account of how he struggled with and then killed the Haysoms was consistent with the deep facial bruise and the bandages to his left-hand fingers that he was seen with at the Haysoms' funeral. J.A. 877. Moreover, Soering's blood was of the same type as the unidentified blood found at the crime scene. J.A. 933, 944.

On direct review, both the Virginia Court of Appeals and the Supreme Court of Virginia denied Soering's petition for an appeal from his convictions and sentences for first-degree murder. On state collateral review, the Supreme Court of Virginia denied his petition for a writ of habeas corpus, after first remanding his Brady claim for an evidentiary hearing. Soering then filed an application for a writ of habeas corpus in federal district court, pursuant to 28 U.S.C. § 2254. The district court denied Soering's application and subsequently denied his motion to alter or amend its judgment.

II.

Applying the standard of review set forth by the Supreme Court in Williams v. Taylor, 120 S. Ct. 1495, 1523 (2000), we consider whether the Supreme Court of Virginia's rejection of Soering's claims "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1).

A.

Soering first argues that the district court erred in upholding the Supreme Court of Virginia's rejection of his

claim that his confessions in England were obtained in violation of Edwards v. Arizona, 451 U.S. 477 (1981). Under Edwards, an accused [. . .], having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police. 451 U.S. at 484. Specifically, Soering contends that, even though he expressed his desire to deal with the police only through counsel at the end of his second interview, he was subjected to further interrogation a few hours later by a Virginia law-enforcement officer (Investigator Gardner) and his British counterparts. Soering argues that, because any self-incriminating statements that he made during the third and subsequent interviews should have therefore been suppressed, the trial court's failure to do so entitles him to habeas relief. We conclude that the district court correctly upheld the Supreme Court of Virginia's rejection of Soering's Edwards claim because, even assuming that Edwards applies to an American law-enforcement officer's interrogation of a German citizen in British custody we cannot say that Edwards was actually violated at all: Soering has simply failed to "rebut[ ]," "by clear and convincing evidence," "the presumption of correctness" that we must accord to the state trial court's factual finding that Soering himself "initiated" the third and subsequent interviews with the police, § 2254(e)(1); J.A. 480.* Soering offers nothing more than sheer speculation about whether the police orchestrated or pressured him into initiating further contact with them after

*The district court held that, under United States v. Verdugo-Urquidez, 494 U.S. 259 (1990), it was clearly established that Edwards applies to custodial interrogations by American law-enforcement officers of foreign citizens in foreign custody in foreign lands. J.A. 1556. Given our disposition infra, we need not address the question whether Edwards does in fact govern custodial interrogations by American law-enforcement officers of foreign citizens in foreign custody in foreign lands.

his second interview. See, e.g., Appellant's Br. at 43-44. And there is strong support in the record for the state court's factual finding that Soering himself initiated further communication with the police. First, after being taken back to his cell, Soering asked one of the jail guards to inform Detective Constable Wright, who had participated in Gardner's earlier questioning of Soering, that he wished to speak to Gardner again. J.A. 609. Second, six minutes before the third interview began, Soering signed the following entry in the custody log at the British police station where he was being held: "I now wish to speak to D/S Beever, D/C Wright, D/C Gardner without my solicitor being present." J.A. 609, 633, 1562. Soering therefore clearly indicated that, regardless of what had transpired beforehand, he was "now," at that point in time, initiating contact with the police. And in doing so, he in no way indicated that he wished to discuss only the British check-fraud charges, rather than the Haysom murders, about which Beever, Wright, and Gardner had interviewed him earlier that day. Third, Soering's statements during the ensuing interview "reflect[ed] no unwillingness to talk or any other reason to believe that he was taken from his cell against his will and at the instance of law enforcement officers"; moreover, Soering made no reference whatsoever to the British check-fraud charges during this interview, which confirms that he did not wish to discuss only those charges. J.A. 1563; 151-90.

Even if the Supreme Court of Virginia's rejection of Soering's Edwards claim was "contrary to," or "an unreasonable application of," Edwards, Soering would still not be entitled to habeas relief on this ground, since Soering has failed to show that the admission of his confessions made in England "had [a] substantial and injurious effect or influence in determining the jury's verdict," thereby causing him "actual prejudice," Brecht v. Abrahamson, 507 U.S. 619, 637 (1993). Soering did not suffer "actual prejudice" because the jury in all likelihood would have reached the same verdict that it did in reliance on Soering's subsequent,

voluntary, counseled confession to a German prosecutor, which Soering does not challenge as being improperly admitted at trial, and which contained many of the same incriminating details that his confessions in England did. See , e.g., J.A. 1034-35 ("the next thing that I can remember is that I stood behind Mr. Haysom, and then blood ran from his neck into his lap. . . . I stood there with a knife in my hand. . . . I don't know whether I stabbed him in the neck or cut down along the neck. . . . Prosecutor: Diagonal cut through the artery? The defendant [Soering]: Yes, that was it."); J.A. 1038 ("finally I injured Mrs. Haysom, too, at her neck"); J.A. 1046 ("I can remember that I caused both of them neck wounds.").

B.

Soering next argues that the district court erred in upholding the Supreme Court of Virginia's rejection of his claim that material exculpatory evidence was withheld from him by the prosecution in violation of Brady v. Maryland, 373 U.S. 83 (1963). Specifically, Soering contends that the Virginia court's decision was "contrary to," and "an unreasonable application of," Brady because there is a "reasonable probability" that the outcome at trial would have been different, Kyles v. Whitley, 514 U.S. 419, 434 (1995), if the prosecution had disclosed to Soering evidence that, within a week of the Haysom murders, a sheriff's deputy briefly detained two vagrants, Shifflett and Albright, who were later convicted of murdering Milliken, another vagrant. Such evidence, Soering argues, would have bolstered his defense that the Haysoms were murdered not by him, but rather, by Elizabeth Haysom, assisted by one or two accomplices.

We conclude that the district court correctly upheld the Supreme Court of Virginia's rejection of Soering's Brady claim because the evidence in question is not material for

purposes of Brady. The Supreme Court of Virginia did not unreasonably apply Kyles in holding that there is no "reasonable probability" that "the result of the proceeding would have been different" had the prosecution disclosed to Soering the evidence concerning Shifflett and Albright, Soering v. Deeds, 499 S.E.2d 514, 517 (Va. 1998) (quoting, inter alia, Kyles, 514 U.S. at 435). First, the only relationship between the Haysom and the Milliken murders was that they occurred in the same county within six days of each other, and both were carried out with a knife. There is no evidence whatsoever that either Shifflett or Albright had ever met, or knew of, Elizabeth Haysom or her parents, nor is there any physical evidence connecting Shifflett or Albright to the Haysom murders. Second, it is highly unlikely that Shifflett and Albright, who murdered another vagrant to rob him of his empty wallet, murdered the Haysoms, since robbery was patently not the motive behind the Haysom murders: silverware, jewelry, $122 in cash, the automobile parked outside and the keys thereto, a television, stereo equipment, and other valuable items that were in plain view were left behind after the Haysoms were murdered. J.A. 1269, 1273, 1281-83, 694, 690-91. Third, the manner in which Milliken and the Haysoms were murdered differed markedly: Milliken's throat was stabbed, not slashed, as was the case with the Haysoms, and thus Milliken died slowly, unlike the Haysoms; moreover, the Haysoms were not sexually mutilated, as was Milliken. Compare J.A. 1243-49 with J.A. 1226-42; see also J.A. 1191. Fourth, it is far from clear that the knife that the deputy found buried in the back seat of his patrol car one week after he detained Shifflett and Albright, and that Soering now alleges was used by Shifflett and Albright to murder the Haysoms, even belonged to the two vagrants, since the deputy could not recall when he had last checked his back seat prior to detaining Shifflett and Albright. J.A. 1120. Fifth, the knife was a very common kind of folding knife, readily available at retail stores. J.A. 1189. Sixth, even if the knife did belong to Shifflett and

Albright, there were no traces of blood on it, and although the blade was "consistent with the size and shape of [the] weapon that could have caused the wounds to [the Haysoms]," the medical examiner explained that he could not determine the precise dimensions of the blade actually used to cause the Haysoms' wounds. J.A. 1187-88, 1186; see also Soering, 499 S.E.2d at 516. In light of the foregoing, we cannot say that the Supreme Court of Virginia's rejection of Soering's Brady claim was "contrary to," or "an unreasonable application of," Brady or Kyles.

C.

Finally, Soering raises a number of ineffective-assistance-of-counsel claims, all of which were rejected by the Supreme Court of Virginia. We agree with the district court that the Virginia court's rejection of these claims likewise was not "contrary to," or "an unreasonable application of," Strickland v. Washington, 466 U.S. 668 (1984).

First, Soering argues that counsel was constitutionally ineffective in failing to object to the prosecutor's comments to the jury about Soering's refusal to submit blood and hair samples, footprints, and fingerprints to the authorities when he was asked to do so. We conclude that counsel's failure to object did not "f[a]ll below an objective standard of reasonableness," Strickland, 466 U.S. at 688, not only because counsel may have made a tactical decision not to draw the jury's attention to such comments by objecting, but also because, in South Dakota v. Neville, 459 U.S. 553 (1983), the Supreme Court upheld the constitutionality of a state law permitting the admission into evidence of a defendant's refusal to submit to a blood-alcohol test, see id. at 918, 923. Soering counters that Neville is distinguishable because in Neville, unlike in the present case, the police had probable cause prior to requesting a blood sample from the defendant and thus the prosecutor's comments did not burden

the defendant's Fourth Amendment right to refuse unreasonable searches of his body. Thus, Soering argues, counsel could have successfully objected to the prosecutor's comments by arguing for an extension of Griffin v. California, 380 U.S. 609 (1965), which held that a prosecutor's or trial court's comments on a defendant's refusal to take the witness stand impermissibly burdened the defendant's Fifth Amendment right to refuse to testify, see id. at 615. We doubt that such an argument could have succeeded because, even if the trial court were willing to extend Griffin to prohibit prosecutors from commenting on a defendant's refusal to consent to searches unsupported by probable cause, the prosecutor's comments would have still been permissible as a means of impeaching Soering's credibility, since Soering testified on his own behalf. See Portuondo v. Agard, 120 S. Ct. 1119, 1125 (2000) (limiting Griffin to "comments that suggest [that] a defendant's silence is [substantive] evidence of guilt" (internal quotation marks omitted)). In any event, we cannot say that Soering was prejudiced within the meaning of Strickland. See infra.

Second, Soering contends that counsel was constitutionally ineffective in failing to preserve an objection to the trial court's refusal to instruct the jury on the crime of being an accessory-after-the-fact. Counsel was not ineffective because under Virginia law, Soering was not entitled to an accessory-after-the-fact instruction at all, since he was not charged with being an accessory-after-the-fact. See Commonwealth v. Dalton, 524 S.E.2d 860, 863 (Va. 2000); Indictments of Jens Soering (June 13, 1986). Counsel was also not ineffective because the trial court was entitled to insist, as it did, on giving an accessory-after-the-fact instruction only if an accessory-before-the-fact instruction was also given. Soering argues that the trial court was not entitled to so insist because, under Virginia law, there was insufficient evidence to support an accessory-before-the-fact instruction. However, there was ample evidence from which the jury could have concluded that Soering participated as an

accessory-before-the-fact in planning the murders of the Haysoms. See, e.g., J.A. 998 (Elizabeth Haysom's testimony that on the morning of the murders, Soering bought a knife from a sporting goods store with some money that Elizabeth had just given him); J.A. 1056 (Soering's testimony that he bought two movie tickets and ordered room service for two on the evening of the murders in order to produce an alibi for Elizabeth). Even if Soering were entitled to an accessory after-the-fact instruction, he was not prejudiced by counsel's failure to preserve an objection to the trial court's refusal to give such an instruction, given the overwhelming evidence that he personally killed the Haysoms. See infra.

Third, Soering argues that counsel was constitutionally ineffective in failing to present more evidence to rebut the prosecution's contention that the bloody sockprint found at the scene of the crime was Soering's. Counsel's performance was not objectively deficient nor was Soering prejudiced, since counsel effectively cross-examined one of the prosecution's witnesses about his failure to compare Elizabeth Haysom's foot impressions with the sockprint, and since counsel demonstrated to the jury during closing argument"how one of Elizabeth's foot impressions matched the sock print almost as well as petitioner's [did]." J.A. 969, 1572; see also J.A. 1076 (counsel reminds the jury during closing argument that the shoe prints found at the crime scene were similar in size to Elizabeth's shoes).

Finally, Soering argues that his rights under Strickland were abridged because his lead trial counsel, who has since been disbarred, was emotionally and mentally troubled at the time of the trial. However, we conclude that the Supreme Court of Virginia's rejection of this claim was not an unreasonable application of Strickland, not only because lead trial counsel did not perform below an objective standard of reasonableness, but also because Soering was not prejudiced, since local co-counsel was of sound mind and represented Soering competently.

Even considering all of the alleged instances of ineffective assistance of counsel cumulatively, we cannot say that Soering was prejudiced within the meaning of Strickland, given the overwhelming evidence of his guilt. Soering's confessions to American, British, and German officials recounted in detail how he and Elizabeth planned the murders and how he then carried them out. See, e.g., J.A. 154-58, 168, 847-48. These accounts of how he struggled with and then slaughtered the Haysoms were consistent with the deep facial bruise and the bandages to his left-hand fingers that he was seen with at the Haysoms' funeral. J.A. 877. And Soering's blood was of the same type as the unidentified blood found at the crime scene. J.A. 933, 944. Given these facts, we cannot say that, "but for counsel's unprofessional errors, the result of the proceeding would have been different," and thus we cannot say that Soering was prejudiced, Strickland, 466 U.S. at 694.

CONCLUSION

For the reasons stated herein, we affirm the district court's judgment denying Jens Soering's application for a writ of habeas corpus.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

JENS SOERING, Petitioner,	)	Civil Action No. 98-0361-R
V.	)	Memorandum Opinion
GEORGE DEEDS, Respondent,	)	By: Jackson L. Kiser Senior U.S. District Judge

ENTERED: February 24, 1999

Petitioner Jens Soering, through (counsel has filed this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner challenges his criminal conviction of: two counts of first degree murder in the Circuit Court of Bedford County, He argues that his confinement pursuant to these convictions is unlawful for the following reasons:

I) the trial court violated his rights under Miranda v. Arizona, 384 U.S. 436 (1966) , and Edwards V. Arizona, 451 U.S. 477 (1981), by admitting evidence of his incriminating statements to law enforcement officers;

II) his attorneys rendered ineffective assistance of counsel in the following respects:

1) they failed to refute the prosecution's evidence as to shoe and sock prints discovered at the scene of the crime,

2) they failed to investigate the circumstances surrounding petitioner's incriminating statements to law enforcement officers,

3) they failed either to object to the prosecutor's remarks to the jury with respect to petitioner's invocation of his right to refuse the taking of physical evidence from his person or to move for the redaction of those portions of the taped confessions in which petitioner invoked his right to counsel,

4) they failed to preserve constitutional objections as to the personal bias of the judge presiding over the trial and as to the partiality of the jury,

5) they failed to preserve an objection to the trial court's refusal to give a jury instruction defining "accessory -after-the-fact,"

6) they forfeited a hearing on a motion to set aside the jury's verdict of guilt;

III) the prosecution withheld exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963).

Respondent filed a motion to dismiss, to which petitioner has responded. Petitioner has also filed a motion for summary judgment. On January 29, 1999, the parties presented oral

argument on the issue of whether petitioner is entitled to summary judgment as to claims (I) and (III) or whether the respondent's motion to dismiss should be granted as to these claims.

Procedural History

In June of 1986, petitioner was indicted of two counts of first degree murder. On June 21, 1991, following a trial in the Circuit Court of Bedford County, a jury found him guilty of both charged counts. On September 4, 1990, the circuit court sentenced petitioner to two consecutive life terms in prison. By order dated October 9, 1991, the Court of Appeals of Virginia denied petitioner's subsequent appeal of his convictions. The Supreme Court of Virginia denied petitioner's petition for appeal of this judgment on April 17, 1992, and denied his petition for rehearing on March 12, 1992. On December 14, 1995, petitioner filed in the Supreme Court of Virginia a petition for writ of habeas corpus in which he raised four claims. On February 1, 1996, petitioner amended his state petition to include a fifth claim. The Supreme Court of Virginia denied relief as to the original four claims but remanded the fifth claim to the Circuit Court for Bedford County for conduct of an evidentiary hearing. After conduct of the evidentiary hearing, the circuit court determined that petitioner was not entitled to relief upon the basis of the only remaining claim. By published opinion, the Supreme Court of Virginia affirmed the circuit court's decision. Soering v. Deeds, 499 S.E.2d 514 (Va, 1998).

Evidence at Trial

At petitioner's criminal trial, the prosecution presented evidence tending to establish the following circumstances surrounding the murders with which petitioner was charged. On March 29, 1985, petitioner and his girlfriend, Elizabeth Haysom, rented a car in Charlottesville and drove to Washington, D.C. The following day, in accordance with plans made with Elizabeth, petitioner purchased a knife and drove by himself to the home of Derek and Nancy Haysom, Elizabeth's parents, in Bedford County. Meanwhile, in an effort to establish an alibi for petitioner, Elizabeth purchased two pairs of movie tickets and two meals from room service at the hotel where she and petitioner were staying. While in Bedford County, petitioner killed Elizabeth's parents by cutting their throats and stabbing them with the knife repeatedly about the torso.

During the subsequent investigation of these killings, petitioner fled to Europe, and Elizabeth Haysom later joined him. Authorities in the United Kingdom ultimately arrested petitioner and Elizabeth in connection with charges of check fraud, a law enforcement officer from Bedford County, Investigator Ricky Gardner, traveled to London and, along with others, conducted several interviews with petitioner. During these interviews, petitioner admitted to killing Nancy and Derek Haysom and provided correct details about the manner in which the two were killed. Specifics provided by petitioner with respect to injuries that he sustained while in the course of killing Derek and Nancy Haysom were also consistent with his appearance shortly after the murders. After his incriminating statements to the investigator from Virginia, petitioner made similar statements to a prosecutor from Germany in an attempt to gain extradition to Germany rather than the United States.

Analysis

Respondent concedes that there are a number of properly exhausted claims but argues that the state courts' adjudication of these claims is entitled to some degree of deference. Prior to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"], Pub.L. 104-132, 110 Stat. 1214, a state court's substantive adjudication of a ground for relief in a petition for writ of habeas corpus would have warranted no deference from a federal court unless there were explicit findings of fact, See Brown v. Allen, 144 U.S. 443 (1953). However, pursuant to 28 U.S.C. 2254(d), as amended by the AEDPA on April 24, 1996:

> An application for writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Under this reviewing standard, a federal court may not interfere with a state court's application of federal law to a claim unless "the state court decision conflicts with 'clearly established federal law as interpreted by the Supreme Court.'" Green v. French, 143 F3d 865, 873 (4th Cir. 1998).

To establish such a conflict, petitioner must demonstrate that no reasonable jurist would disagree that petitioner is entitled to relief upon the basis of relevant, even if not directly controlling, precedent by the Supreme Court. Id. Furthermore, under 28 U.S.C. §2254(e)(1), as amended by the AEDPA, a state court's explicit factual findings are presumed correct unless the petitioner rebuts them by clear and convincing evidence.

In claim (1), petitioner argues that, while he *was* held in custody in the United Kingdom, his rights under Miranda and Edwards were violated and that thus the trial court erred by admitting the incriminating statements arising from these violations as substantive proof of his guilt. It is undisputed that Virginia authorities conducted six interviews with petitioner from June 5 to June 8, 1986. These interviews took place during the following periods of time: 3:35 until 5:28 PM on June 5 ["Interview #1"], 6:00 until 6:45 PM on June 5 ["Interview #2"], 8:05 until 11:14 PM on June 5 ["Interview #3"], 11:40 AM until 1:21 PM on June 6 ["Interview #4"] 11:21 until 4:17 PM on June 7 ["Interview #5"] and 4:45 until sometime after 7:18 PM on June 8 ["Interview #6'].[1] For the purposes of trial, the trial court excluded admission of evidence as to the statements made by petitioner in Interviews #1 and #2. The trial court permitted admission of evidence as to the statements made by petitioner in Interviews #3 through #6. In affirming the trial court's ruling that the majority of petitioner's incriminating

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[1]There was some dispute at the evidentiary hearing as to when certain interviews began or ended, but nothing said by petitioner outside of the foregoing periods of time was introduced against him at trial. I also note that, at the suppression hearing, the parties sometimes referred to Interview 16 as two interviews because there was a break from 6:45 until 7:18 PM, because the two British detectives joined the interview at 7:18 PM and because petitioner signed another form waiving his rights under Miranda at 7:18 PM. I adopt the approach of the trial court in addressing the interviews on June 8, 1986, as a single interview.

statements were admissible, the Court of Appeals of Virginia held as follows:

> "Neither the [C]onstitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect to our own citizens." United States v. Curtis-Wright Export Corporation, 299 U.S. 304, 218 (1936). See United States v. Verdugo-Urguidez, [494 U.S. 259, 264] (1990). The petitioner, a German citizen, in custody in Great Britain on British charges, is not entitled to invoke the protection of the Fifth Amendment to the United States Constitution even where, during custodial interrogation by British authorities on British charges, the interrogation touches upon offenses committed in the United States.

In refusing petitioner's petition for appeal on direct appeal, the Supreme Court of Virginia did not expressly adopt the reasoning of the trial court or the Court of Appeals of Virginia with respect to petitioner's argument that his incriminating statement were subject to the exclusionary rule under Edwards and Miranda.

Petitioner now argues that the failure to exclude evidence as to statements made by him during Interviews #3 and #4 violated his rights under Edwards because he unequivocally invoked his right to counsel at the end of Interview #2 and because there is no evidence as to any initiation of contact with Gardner until just before Interview 15. To a lesser extent, petitioner argues that admission of evidence as to his statements during Interviews #5 and #6 violated his rights under Edwards because his undisputed initiation of contact with Gardner prior to Interview 05 was for the limited purpose of discussing legal procedures with Gardner.

Respondent first argues in response that the conclusion by the Court of Appeals of Virginia that petitioner had no rights under the Fifth Amendment is "*reasonable under clearly established Federal Law*, as determined by the Supreme Court of the United States," and thus entitled to deference under §2254(d). In response, petitioner contends that neither of the cases cited by the Court of Appeals stands for the proposition for which it is cited. In fact, petitioner argues that, under current Supreme Court jurisprudence, it is clearly established that he had rights under the Fifth Amendment. Citing Verdugo-Urguidez, he maintains that, insofar as a violation of a criminal defendant's rights under the Fifth Amendment are violated relative to a confession, such violation occurs at trial if and when evidence of the confession is admitted into evidence. 494 U.S. at 264, quoting, Kastigar v. United States, 406 U.S. 441, 453 (1972). Petitioner posits that, therefore, the discussion of extraterritoriality in Verdugo-Urauidez is inapplicable because it deals with the Fourth Amendment, a violation of which occurs at the site of the illegal conduct on the part of state actors. He contends, in essence, that the admission of his incriminating statements at his criminal trial was thus a violation of Miranda and Edwards regardless of where the interrogations leading to the incriminating statements took-place because the trial was conducted in Virginia and because the statements were elicited by a Virginia state actor in the furtherance of an investigation of the offenses that occurred in Virginia.

I agree with petitioner's position that the legal conclusion by the Court of Appeals of Virginia that he had no rights under the Fifth Amendment was unreasonable under clearly established federal law. I first note that the Court of Appeals of Virginia seemed to find it significant that there were British officers involved in the interrogation of petitioner. The record before the court is clear that Gardner controlled the interrogations and that the British detectives were merely furthering the interests of the

Bedford investigation. In my view, therefore, any reliance by the Court of Appeals on the British detectives, participation in the interrogations to conclude that petitioner had no rights under the Fifth Amendment was unreasonable. [2] See Lugar v. Edmondson Oil Co., 457 U.S. 922 (state action present if conduct allegedly causing violation of federal right may be fairly attributable to the state); Dennis v. Sparks., 449 U.S. 24, 27-28 (1980) (an individual acts under color of state law if "he is a willful participant in joint action with the state or it agents"). Second, as petitioner argues, the decision in Verdugro-Urcluidez makes clear that the Fourth and Fifth Amendments are different and that violations of the Fifth Amendment occur at trial. Although an argument could be made that violations of the prophylactic rules set forth in Miranda and Edwards occur at the site of the interrogation, I am convinced that, under current Supreme Court jurisprudence, it is where the violation of the constitutional amendment occurs that controls whether a non-resident alien may avail himself of the concomitant protections of that amendment.

Respondent next argues that, even if the legal reasoning adopted by the Court of Appeals of Virginia was unreasonable, the Supreme Court of Virginia may very well have adopted the legal reasoning and factual findings of the trial court in refusing petitioner's petition for appeal. In response, petitioner argues that this court must look to the last reasoned opinion by a state court in assessing whether the state adjudication of his claims was reasonable under §2254 (d)[3]. I disagree. Nothing in the statutory language of

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[2]For this same reason, I refer to Gardner and the British officers collectively as "Virginia authorities."

[3]Although petitioner does not cite any pertinent case law in support of this argument, litigants in actions pursuant to §2254 often cite Ylst v. Nunnemaker, 501 U.S. 797 (1991), in so arguing. Far from dealing with §2254(d), as amended by the AEDPA, the decision in Ylst addresses only the issue of whether a claim should be deemed procedurally defaulted if the highest state court did not expressly adopt a finding of procedural default by a lower court.

§2254(d) can be read to suggest that, in evaluating whether the ultimate decision reached by the state courts is reasonable, a federal court must look only to the reasoning adopted by the highest state court to review the claim. Section 2254(d) states only that a federal court may not grant a petition for writ of habeas corpus "with respect to any claim that was adjudicated on the merits in State court proceedings. (emphasis added) " unless the resulting decision was unreasonable. Although petitioner was required to exhaust his claims under Edwards and Miranda to the highest state court in accordance with §2254(b), it does not necessarily follow that the trial court's reasoning for disposing of these claims no longer constitutes an "adjudict[ion] on the merits" to which a federal court must defer if there is no clear indication that the state appellate courts adopted the same reasoning as the trial court.

Particularly where, as here, neither of the two subsequent state courts to review the federal claims at issue expressly rejects the factual findings and legal conclusions of the trial court, I believe that, under §2254(d), a federal court must defer to the trial court's adjudication of such claims unless the adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law" or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." In my opinion, the trial court's factual findings and legal conclusions should lose none of their weight merely because the Court of Appeals of Virginia, or even the Supreme Court, provided an alternate albeit incorrect, rationale for the result reached by the trial court. This approach is consistent with the Supreme Court's decision in Sumner v. Mata, 449 U.S. 539 (1981). In Sumner, the Court held that, under the old §2254(d), a federal court was bound by factual findings made by either a state trial or appellate court. Furthermore, the reference to "State court proceedings" in the new §2254 (d), in contrast to the singular

"State Court proceeding" in §2254(e)(1), implies that the Proceedings in state court should be viewed in the aggregate. Jeffries v. Wood, 114 F.3d 1484, 1500 n.19 (9th Cir. 1996).

In the present case, the trial court conducted a lengthy suppression hearing after which it issued a memorandum letter setting forth findings of fact and conclusions of law. The trial court ruled, in essence, that petitioner's incriminating statements were admissible because they were voluntary, because petitioner's Sixth Amendment right to counsel, in the sense contemplated by Massiah v. United States, 377 U.S. 201 (1964), had not yet attached and because petitioner knowingly and voluntarily waived both his right to remain silent under the Fifth Amendment and his right to counsel as a safeguard of this right to remain silent under Edwards, at least with respect to the incriminating statements that he chose to make. In making these legal conclusions, the trial court found, inter alia, that no threats of harm to Elizabeth Haysom induced the incriminating statements, that petitioner "initiated most of the interviews [giving rise to incriminating statements] himself," that "frequent breaks were taken" during the interviews and that petitioner's judgment was not impaired by drugs, alcohol or some mental disability. The trial court also concluded that petitioner initiated interviews 13 through #6.

In my opinion, the foregoing disposition of petitioner's claims was reasonable under clearly established federal law in light of the evidence presented at the suppression hearing. For a suspect's incriminating statements to be involuntary under the Fifth Amendment, they must be something other than "the product of art essentially free and unconstrained choice." Schneckloth v. Bustamonte, 412 U,S. 218, 225 (1973), quoting, Culombe v. Connecticut, 367 U.S. 568, 602 (1961). Once a suspect invokes his right to counsel under Miranda during the course of a custodial interrogation, law enforcement officers may not conduct further interrogation "unless the accused himself

initiates further communication, exchanges, or conversations" with them, Edwards, 451 U.S. at 484-85, and makes a voluntary and intelligent waiver of his right to have counsel present during interrogations. Oregon v Bradshaw, 462 U.S. 1039 (1983). The accused invokes his right to counsel in the sense-contemplated by Edwards if he makes an unequivocal and unambiguous request for counsel. Davis v. United States, 512 U.S. 424 (1994). The test for whether a request for counsel was unequivocal is an objective one, and thus the law enforcement officers' subjective impression is irrelevant. Id. at 459; Poyner v. Murray, 964 F.2d 1404, 3.412 (4th Cir. 1992). A qualified request for counsel in which the accused expresses willingness to talk: to law enforcement officers about certain aspects of the offense at issue without the benefit of counsel does not require the complete cessation of questioning. Connecticut v. Barrett, 479 U.S. 523 (1987).

I first note that the instant petition falls far short of showing that the trial court was unreasonable in finding either that petitioner's incriminating statements in Interviews #3 through #4 were involuntary or that petitioner did not knowingly and voluntarily waive his rights under Miranda and Edwards at the start of these interviews, irrespective of who initiated them. Although petitioner asserts in his petition that his incriminating statements were involuntary, he makes very few specific allegations in support of this assertion other than those detailing what he believes to be technical violations of Edwards. The trial court made factual findings that petitioner understood his right to remain silent, that there was no coercion used on petitioner and, in particular, that no one threatened to cause Elizabeth Haysom harm if plaintiff did not confess. In light of these factual findings, there is nothing in the record to support petitioner's claims that his incriminating statements were involuntary in

the sense contemplated by Schneckloth.[4] Even insofar as the evidence at the suppression hearing has been supplemented in the instant petition, petitioner has still not established that his incriminating statements were "involuntary" under the Fifth Amendment. Furthermore, in light of the factual findings by the trial court, he has not shown that the waiver of his rights under Edwards and Miranda was unintelligent or involuntary. Indeed, he has indicated throughout every judicial proceeding thus far that he made the incriminating statements as part of a strategy to save Elizabeth Haysom from the death penalty. This motivation, though perhaps ill-advised, does not render the incriminating statements involuntary or his waiver of his rights under Edwards and Miranda unintelligent or involuntary.

The question thus becomes whether any of petitioner's incriminating statements were obtained in technical violation of the prophylactic rules set forth in Miranda and Edwards. There is no dispute that petitioner made the following statement at the end of Interview #2:

> I have not told you everything. I know something about my involvement or noninvolvement in this crime that I have not told Mr. Gardner and I will only discuss it first with my attorney and then, if my attorney suggests, with the police.

Petitioner argues that the foregoing statement was an unequivocal invocation of his right to counsel under Davis, supra. I agree. Nonetheless, in my view, the trial court was clearly reasonable in concluding that petitioner initiated contact with his interviewers in the sense contemplated by Edwards after this invocation of his right to counsel.

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[4]Petitioner has not rebutted the trial court's factual findings by clear and convincing evidence, See §2254(e)(1).

At the suppression hearing, the trial court admitted evidence that, at 7:59 PM on June 5, 1986, petitioner signed the following entry in the custody log at the facility where he was being housed: "I now wish to speak to D/S Beever, D/C Wright, D/C Gardner without my solicitor being present." Although petitioner now appears to dispute whether a portion of the entry can be read to say "D/C Gardner," he did not dispute how the entry read during the suppression hearing.[5] During the suppression hearing, petitioner steadfastly denied having initiated the contact leading to this entry, but he did not deny signing his name and thus adopting the entry as an expression of what he desired. Moreover, Detective Constable Wright, one of the British officers, testified that, just prior to this entry in the custody log, an officer supervising petitioner's cell block contacted him to inform him that petitioner was requesting to see him

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[5]I do not have a copy of this entry in the custody log before me. Without belaboring the point, I note that the inclusion of Gardner in the request to speak to certain law enforcement officers is not crucial to my holding. Even under petitioner's version of events, he signed an entry initiating contact with two of his interrogators. He claims now that he may have contacted them in reference to an ongoing investigation of whether he was involved in certain British offenses. However, he testified at the suppression hearing that he expressed no desire to anyone to speak with any detective and that he merely signed what was placed in front of him. Moreover, petitioner presented no evidence during the suppression hearing that he made any effort whatsoever to communicate a desire to speak only about British offenses, Under Bradshaw, a suspect need only make statements that a reasonable officer would interpret as an attempt to reinitiate conversations about the offenses at issue for the requirement of reinitiation under Edwards to be satisfied. 469 U.S. at 2835. The entry in the custody log, even if it does not contain Gardner's name, clearly constitutes a statement that a reasonable officer might interpret as an attempt to reinitiate conversations about the Haysom murders.

again.[6] Finally, petitioner's statements during Interview #3 reflect no unwillingness to talk or any other reason to believe that he was taken from his cell against his will and at the instance of law enforcement officers. In combination with the fact that petitioner's testimony at the suppression hearing itself was inconsistent and evasive, the foregoing evidence clearly supports an inference that petitioner "initiated" contact with his interrogators in the sense contemplated by Edwards, and I am of the opinion that the trial court's conclusion that petitioner did so was reasonable.

Petitioner further appears to argue that certain statements made by him during the course of Interviews #3 through #6 should be construed as unequivocal requests for counsel during these interviews. In denying petitioner's motion to suppress evidence as to Interviews #3 through #6, the court found that petitioner never made more than a qualified request for counsel and demonstrated a continued willingness to discuss many aspects of the murders during these interviews. A review of the transcripts of Interviews #3 through #5 supports this finding. Moreover, petitioner has never presented any reason to believe that he made an unqualified request for counsel in Interview #6, Under Connecticut v. Barrett, supra, therefore, the law enforcement officers were not required to cease questioning under Edwards. For this reason, as well as those discussed supra, I find that, under clearly established federal law, the trial court was reasonable in concluding that Interviews #3 through #6 were admissible.

In any event, I am of the opinion that, even under a de novo reviewing standard and even assuming that petitioner's rights under Edwards and Miranda were violated, petitioner has not established prejudice flowing from the

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[6]At the suppression hearing, petitioner did not object to this testimony as hearsay. It is clear, in fact, that this testimony is admissible under Virginia law insofar as it was offered to show Wright's motivation for going down to petitioners cell block, See generally Fuller v, Commonwealth, 113 S.E.2d 667 (Va, 1959)

admission of evidence as to the foregoing incriminating statements as substantive proof of his guilt. To obtain relief under § 2254, a petitioner must show that the violation of which complains "had a substantial and injurious effect or influence in determining the jury's verdict," Brecht v Abrahamson, 507 U.S. 619, 637 (1993). As respondent contends, petitioner subsequently made very similar incriminating statements to a German prosecutor in an attempt to be extradited to Germany rather than the United States. Although petitioner argues that these subsequent statements are tainted by the earlier violation of his rights under Miranda and Edwards, violations of such prophylactic rules do not taint subsequent voluntary confessions, at least under the circumstances presented by petitioner. See Oregon v. Elstad, 470 U.S. 298, 306 (1985); McNeil v. Wisconsin, 501 U.S. 171, 176 (1991). It is undisputed that the statements to the German prosecutor were voluntary.

Petitioner further argues that the statements to the German prosecutor ["the German statements"] differ from those given to Virginia authorities in several significant respects. Specifically, he argues that the German statements were less incriminating because, in these statements, he did not admit outright that he killed Elizabeth and Derek Haysom or that he had brought the murder weapon with him to the house. He also contends that the German statements were less damaging because, in contrast to the statements to Virginia authorities, he indicated in these later statements that he drank a great deal of alcohol before ending up in a physical altercation with the Haysoms[7] He appears to posit that, had the statements to Virginia authorities been

[7]Petitioner also contends that, in the German statements, he indicated that Derek Haysom pushed petitioner's head against a stone wall and that Nancy Haysom rushed him with a steak knife after Derek Haysom's throat had been cut. As related by Investigator Gardner at trial, petitioner's final confession to him included these same statements, I further note that petitioner referred to the consumption of alcohol in many of his statements to Virginia authorities.

excluded, he could have relied on the defense of self-defense or, at the very least, avoided conviction of first degree murder. Finally, he argues that he could have more easily explained the German statements to the jury because they were made pursuant to the advice of counsel and because they were motivated by an attempt to be extradited to Germany rather than the United States, where he faced the death penalty.

I disagree with petitioner that, if only his German statements, and not his statements to Virginia authorities, had been admitted at trial as substantive proof of his guilt, there is any significant likelihood that the outcome of the proceeding would have been different. Petitioner ignores all the evidence available to the prosecution as a means to corroborate and elaborate upon his German statements. While it is true that petitioner did not admit in the German statements to inflicting the fatal wound as to either Derek or Nancy Haysom or to having the murder weapon with him, petitioner did admit, inter alia, that he traveled to the Haysoms' residence on the night of their murders, stood over Derek Haysom after Haysom's neck had been slit, engaged in an altercation with Nancy Haysom involving a knife and made great efforts to cover up the foregoing activities. In light of these admissions, not only would it have been reasonable for the jury to draw the inference that petitioner had committed the charged murders, but there was substantial evidence to corroborate such an inference.

The prosecution introduced letters from petitioner to Elizabeth Haysom, and vice versa, that could be construed to establish a longstanding plan to kill Derek and Nancy Haysom and elicited testimony from Elizabeth Haysom herself about this plan and the circumstances surrounding petitioner's trip to her parents' house, including how and when petitioner purchased a knife for this trip. The prosecution further presented evidence that, at the funeral service for Derek and Nancy Haysom, petitioner exhibited injuries consistent with his account of the killing in his

statements to the German prosecutor and that other very specific details provided by him were corroborated by evidence obtained from the scene of the murders. Furthermore, the coroner who performed the autopsy on the Haysoms' bodies testified as to a total of forty-two stab wounds to the victims and multiple cuts to the areas surrounding the necks of both victims.

When considered in combination with the foregoing evidence, the German statements were not only clearly sufficient to prove petitioner's guilt of first degree murder beyond a reasonable doubt, but there is, in my opinion, no reasonable likelihood that a jury would have found to the contrary unless, perhaps, petitioner presented his own version of events by taking the stand. While at the same time corroborating petitioner's German statements to some extent, the prosecution's other evidence, particularly the coroner's testimony, called into serious question any claim that the killings were in self-defense or amounted to only second-degree murders. As petitioner now argues, he might have explained why he made the statements to German officials and why the other evidence appeared to corroborate these statements, but it would have also been necessary for him to deny either that he committed the murders or, at the very least, that the circumstances were as Elizabeth described and the other evidence tended to indicate. He has offered no reason to believe that he had any other available evidence to refute the prosecution's prima facie showing of first degree murder. Insofar as petitioner's testimony at trial was inconsistent with his statements to Virginia authorities, the prosecution could have impeached petitioner with his statements to Virginia authorities, regardless of whether they were obtained in violation of Miranda and Edwards, See Harris v. New York, 401 U.S. 2220 224-226 (1971) (unwarned but voluntary confession may be used for impeachment) . Petitioner might have explained these prior inconsistent statements as he did at trial and as he does in the instant petition, but he clearly would not have been in a

much better position than he was at trial when his statements to Virginia authorities were introduced as substantive proof of his guilt. [8] Therefore, I am of the opinion that, in light of both the availability of petitioner's statements to Virginia officials as impeachment evidence and the other substantial evidence against him, including the German statements, the admission of petitioner's statements to Virginia authorities as substantive proof of his guilt did not have "a substantial and injurious effect or influence in determining the jury's verdict." See Brecht, supra. For this reason, as well as the reasons discussed above, I shall deny relief as to claim (I).

In claim (II), petitioner challenges the performance of his attorneys at various stages of the criminal proceedings. The Sixth and Fourteenth Amendments protect, a criminal

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[8]Some additional elaboration regarding the amount of alcohol consumed by petitioner is perhaps necessary because the only evidence as to this issue was provided by petitioner himself in his various incriminating statements. Petitioner stresses that, in contrast to the German statements, the statements to Virginia authorities did not include his remarks that he consumed three beers before arriving at the Haysoms' residence and consumed more alcohol once there. At trial, petitioner was free to pursue a defense to the charges of first degree murders through reliance on voluntary intoxication, as evidenced by the German statements, even once the statements to Virginia authorities were admitted against him as substantive proof of his guilt. In fact, he obtained jury instruction on this very issue, and his statements to Virginia authorities bolstered this partial defense to some extent. Even if the statements to Virginia authorities had been excluded as substantive proof of petitioner's guilt, petitioner could not have testified at trial in support of such a theory of defense without risking impeachment by those same statements to Virginia authorities, In any event, it is clear that the jury concluded either that the remarks about alcohol consumption in the German statements were not credible or that petitioner was not so drunk as render him incapable of pre-meditation. In so doing, the jury undoubtedly relied in part on petitioner's own testimony that he emphasized the role of alcohol in the German statements to increase the likelihood of extradition. Under such circumstances, I do not see how the exclusion of statements in which petitioner made fewer references to alcohol consumption could have affected either conclusion by the jury to any appreciable degree. As detailed supra, there was also substantial evidence of pre-meditation prior to any consumption of alcohol.

defendant's right to the effective assistance of counsel at trial. To demonstrate that this right has been denied, petitioner must show that his counsel's representation fell below an objective standard of reasonableness and that, but for counsel's errors, there *was* at reasonable probability that the result of the trial would have been different. See Strickland v. Washington, 466 U.S. 668 (1984), A reasonable probability is one which undermines confidence in the outcome of the trial. Id.

As a preliminary matter, I note that petitioner presents evidence that one of his attorneys during the criminal proceedings was mentally impaired during the. criminal proceedings. Specifically, petitioner has submitted documents relating to disciplinary action taken against Richard Neaton, one of his attorneys, as a member of Michigan bar. In his response to disciplinary charges, Neaton indicated through counsel that he suffered from an "emotional or mental disability" during a period of time encompassing the criminal proceedings against petitioner. Petitioner argues that prejudice should be presumed as a result this impairment to one of his attorneys. Although petitioner cites several cases by the United States Supreme Court in support of this proposition, a review of them reveals that they fall far short of establishing that prejudice should be presumed under the circumstances presented by him. In addition, a fair reading of Strickland does not compel petitioner's position. Furthermore, it is not clearly established under Supreme Court jurisprudence that errors committed by counsel should be considered cumulatively in evaluating prejudice. See Fisher v. Angelone., 163 F,3d 835 (4" Cir. 1998) ; Wainwright v. Lockhart, 80 F. 3d 1226 (8th Cir.), cert. denied, 117 S.Ct, 395 (1996) (holding that errors by counsel should not be viewed cumulatively). Therefore, for the Supreme Court of Virginia's adjudication of the allegations in claim (2) to be unreasonable, it must be clear from petitioner's allegations in the state petition that

petitioner was prejudiced by at least one of the enumerated deficiencies in his attorneys' conduct.

In subpart (a), petitioner contends that his attorneys were ineffective for failing to rebut testimony by a witness for the prosecution that sock and shoe prints obtained from the scene of the crime matched an impression of petitioner's bare foot in several respects. At trial, over petitioner's objection, the trial court permitted a witness for the prosecution, Robert Hallett, to point to what he viewed as significant correspondences between the sock print and petitioner's foot impression. Petitioner argues that there was ample evidence available to call into question the obvious inferences to be drawn from Hallett's testimony, i.e. that the sock print was petitioner's. Specifically, he claims that there were numerous experts available to contradict the implied significance of the correspondences between the sock print and his foot impression. He further argues that the foot impressions obtained from Elizabeth Haysom and her brother also bore similarities to the sock print. Finally, he contends that the length of the shoe-print obtained from the crimes scenes suggested a smaller size shoe than worn by him.

The short answer to petitioner's argument regarding the availability of experts who would have disagreed with Hallett's implied conclusions is that, due to a motion in limine made by petitioner's attorneys, the trial court had ruled inadmissible expert opinions as to whether the sock print originated from petitioner's foot or whether certain correspondences should be given more weight. Due to this ruling by the trial court, the most that experts for the defense could have done is point to differences between the sock print and petitioner's foot impression, Although the benefit of hindsight might cause petitioner to question his attorneys' decision to make the motion in limine, the decision to do so was clearly legitimate trial strategy under Strickland. By making such a motion, petitioner's attorneys prevented the prosecution from presenting any expert opinion on the

ultimate issue of whether the sock print originated from petitioner's foot. Given that petitioner's attorneys highlighted flaws in Hallett's implied conclusions about the sock print during both cross-examination of Hallett and closing arguments, I am also of the opinion that it is reasonable to conclude that petitioner was not prejudiced by any of the other deficiencies in his attorneys I conduct outlined in subpart (1). As respondent argues, petitioner's attorneys uncovered on cross-examination of Hallett that Hallett had not compared all of Elizabeth Haysom's foot impressions to the sock print, that another of Elizabeth's foot impressions was the same length as the sock print and that another significant correspondence between the sock print and petitioner's foot impression varied only by an eighth of an inch from one of Elizabeth's foot impressions. Petitioner's attorneys also stressed and elaborated upon these same during closing argument. In fact, he used the foot impressions to demonstrate to the jury how one of Elizabeth's foot impressions matched the sock print almost as well as petitioner's. He also emphasized through the use of several foot impressions taken from Elizabeth that no one leaves the same foot impression twice, once the trial court had ruled inadmissible expert opinions as to whether certain correspondences between the foot impressions and sock print should be given more weight or whether the sock print originated from any one person, I fail to see how the elicitation of testimony from what could have amounted to lay witnesses as to the comparisons detailed by petitioner's attorneys in closing arguments would have affected the outcome of the trial. In light of the cross-examination of Hallett, the closing arguments and the other 'evidence against petitioner, including his confessions in which he provided reason to believe that a sock print of his would be where the sock print was found, it is also reasonable to conclude that introduction of additional comparisons between the sock print and Elizabeth's various foot impressions and her brother's would not have affected the outcome of the trial. I

am further of the opinion that there is no reasonable likelihood of a different outcome if evidence as to the inconclusiveness of the size of the shoe print that was also obtained from the scene of the crime had been admitted at petitioner's trial.

As a final matter under subpart (1), petitioner attempts to overcome any finding that he was not prejudiced by his attorneys' failure to respond differently to the prosecution's evidence with respect to the sock print by pointing to a post-trial statement by one of the jurors who sat at his criminal trial. The juror stated, in essence, that, if it were not for the prosecution's evidence as to the sock print, he would not have "voted" to convict. Under federal aid Virginia law, this evidence is inadmissible as a means of showing prejudice. See Tanner v. United States, 483 U.S. 107, 126-27 (19S7) (a criminal defendant is not entitled to inquire into the deliberative processes of a jury after the jury has rendered its verdict); Jenkins v. Commonwealth, 423 S.E.2d 3650, 370 (1992) (same). Furthermore, how a particular juror viewed the evidence is irrelevant. The standard under Strickland requires an objective determination of whether a reasonable jury would have convicted petitioner had his attorneys performed differently: "The assessment of prejudice should proceed on the assumption that the decision maker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncracies of the particular decisionmaker. " 466 U.S. at 694. Accordingly, having determined the Supreme Court of Virginia's adjudication of subpart (1) to be reasonable, I must deny relief as to subpart (1).

In subpart (2), petitioner contends that his attorneys during the criminal proceedings were ineffective for failing to interview petitioner's British counsel., Keith Barker, in an effort to suppress petitioner's incriminating statements to Virginia authorities while in the United Kingdom. Petitioner first appears to argue that Barker may have been able to

provide additional information with which petitioner might have challenged the voluntariness of his confessions to Virginia authorities, However, petitioner states only that Barker might have testified as to the "oppressive" nature of petitioner's circumstances in British custody. This broad allegation, though supported by an affidavit to the same effect, does not show that petitioner could have succeeded in showing that his confessions were involuntary in the sense contemplated by Schneckloth when considered in combination with the confessions themselves and the other evidence at the suppression hearing.

Petitioner next contends, in subpart (2), that an interview with Barker would have disclosed that law enforcement officers violated petitioner's rights under the Sixth Amendment by failing to inform him that his British counsel was available for consultation. Specifically, petitioner maintains that Barker would have stated that he made several requests to be present for the interrogation of petitioner, that he was available at all times to consult with petitioner, and that he received no word that petitioner was seeking to speak to counsel. Under Escobedo v. Illinois, 378 U.S. 478 (1963), law enforcement officers may not interfere with the Sixth Amendment right of an accused to consult with his attorney by misrepresenting to the accused the availability of the attorney for consultation. However law enforcement officers do not violate any right of an accused by failing to inform him during a custodial interrogation that an attorney has been retained on his behalf, that his attorney is asking to see him or that the attorney is otherwise available for consultation, Moran v. Burbine, 475 U.S. 412 (1986), Therefore, only if the information possessed by Barker could have established that petitioner's interrogators misrepresented Barker's availability would petitioner have

been able to demonstrate a violation of his rights through reference to this information at the suppression hearing.[9]

Petitioner has presented nothing to indicate that his interrogators misrepresented the availability of Barker. Petitioner asserts that his interrogators informed him that obtaining counsel was "impossible." The exchange to which petitioner appears to allude occurred as follows:

> [PETITIONER]: I will not discuss the points you have just mentioned ... until I am interviewed by you with an attorney of the country in which the trial will be held,
>
> BEEVER [a British law enforcement officer involved in the interrogation]: Are you asking for an attorney at this precise moment?
>
> [PETITIONER]: I, ah-
>
> BEEVER: Let be more fair with you. If you're asking me now in London at quarter past one nearly in the afternoon and you're asking me for an American attorney, or asking [Investigator] Gardner for an American attorney, that's a fairly impossible task, isn't it?

Whatever else the statements by Beever might be, they are not misrepresentations with respect to the availability of Barker for consultation. According to petitioner's own evidence, Barker was not an American attorney. Moreover, petitioner has fallen far short of showing that it would not have been "a fairly impossible task" to get him an "American attorney" in London at that particular time. For this reason,

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[9]Even then, I question whether Barker, who apparently was licenced to practice law only in the United Kingdom, could have served as counsel for petitioner in an interrogation regarding Virginia crimes.

as well as those articulated supra, petitioner has not shown prejudice stemming from his attorneys' failure to interview Barker prior to the suppression hearing. Accordingly, having determined the adjudication of subpart (2) to be reasonable, I must deny relief as to this subpart.

In subpart (3), petitioner first argues that his attorneys were ineffective for failing to object to the prosecutor's reliance on petitioner's assertion of his right to refuse the taking of physical evidence from his person. As respondent argues, however, petitioner has no clearly established right under federal law that would prohibit the prosecution from commenting on petitioner's refusals to provide physical evidence. See South Dakota v. Neville, 459 U.S. 533 (1983) (holding that admission of defendant's refusal to submit to a blood test is; constitutionally, admissible as evidence that he was driving under the influence). Moreover, petitioner appears to have no right under state law that would prohibit the prosecutor from commenting on petitioner's conduct in this regard. See Farmer v. Commonwealth, 404 S.E.2d 371, 372-73 (Va. App, 1991). Therefore, petitioner has failed to show that his attorneys performed inadequately or prejudiced petitioner by failing to object to these comments by the prosecutor.

In subpart (3), petitioner next contends that his attorneys were ineffective for failing to ensure that petitioner's verbal efforts to invoke his right to counsel were redacted from the tapes and transcripts of his confessions. He argues that his attorneys could have moved for such redaction on the theory that evidence regarding any attempt to invoke his rights under the Fifth Amendment was inadmissible at his trial. See Doyle v. Ohio, 426 U.S. 610 (1976). Even assuming that petitioner is correct, I agree with respondent that petitioner cannot show prejudice flowing from his attorneys' performance in this respect. Petitioner's entire defense hinged on his position that he confessed to murdering Derek and Nancy Haysom to save Elizabeth Haysom. During closing arguments, petitioner's attorneys

relied on petitioner's inexperience and vulnerability as the source for petitioner's motivation in confessing. In my opinion, it could not have hurt petitioner at trial to have his inexperience and vulnerability emphasized by his attempts to obtain counsel for consultation. In fact, a review of the trial transcript reveals that petitioner's attorneys elicited testimony from petitioner himself as to many attempts to invoke his rights under the Fifth Amendment during the interrogations. The clear purpose of this testimony was to highlight that petitioner's own lack of legal expertise caused him to make an ill-advised false confession. Petitioner even testified that, due to his inability to consult with anyone on the matter, he mistakenly believed that he would be protected from prosecution in Virginia by a form of diplomatic immunity. Therefore, petitioner clearly was not prejudiced in the sense contemplated by Strickland by his attorneys' failure to move for the redaction of the confessions themselves. For this reason, as well as those articulated supra; I find that the Supreme Court of Virginia's adjudication of subpart (3) was reasonable. Accordingly, I must deny relief as to subpart (3).

In subpart (4), petitioner argues that his attorneys were ineffective for failing to preserve and raise on appeal certain federal and constitutional issues arising at trial. Respondent argues that the arguments in subpart (4) have never been exhausted in state court and that, if petitioner attempted to raise them in state court now, the state court would determine them to be procedurally defaulted under Virginia Code § 8, 01-654 (B) (2) because petitioner did not raise these arguments in his first: state petition. I agree. Where a petitioner has not presented his claims to the highest court of the state in which he was convicted, the federal court looks to applicable state law under which the state court would have ruled; if it is clear that the state's law would bar state review, the federal court need not dismiss the claim to allow exhaustion of state remedies, but federal review of the claim is also barred. See Teague v. Lane, 489 U.S. 288, 297-98 (1989); Bassette v. Thompson, 915 F. 2d

932 (4th Cir. 1990) Therefore, subpart (4) is barred from federal review. Accordingly, I shall deny relief as to subpart (4). In subpart (5), petitioner argues that his attorneys were ineffective for failing to press for a jury instruction defining "accessory-after-the-fact" or to preserve an objection to and appeal any refusal by the trial court to give this jury instruction. At trial, the court indicated that it would only give an instruction as to "accessory-after-the-fact" in conjunction with an instruction as to "accessory-before-the-fact." At that point, petitioner's attorneys withdrew a request for a jury instruction as to "accessory-after-the fact."

In Virginia, both the prosecution and a criminal defendant are entitled to jury instructions as to their theory of the case. Simms v. Commonwealth, 346 S.E.2d 734, 735 (Va.App. 1986). However, there must be more than a scintilla of evidence in support of the proffered instruction. Frye v. Commonwealth, 345 S.E.2d 267, 280 (Va. 1980) In accordance with these principles, a criminal defendant is entitled to a jury instruction defining "accessory-after-the-fact" under circumstances in which there is more than a scintilla of evidence introduced at his trial that he was only an "accessory-after-the-fact" to the offense for which he is being prosecuted, Dalton v. Commonwealth, 499 S.E.2d 22 (Va. 1998).

As a preliminary matter, I note that the posture of this claim is not as petitioner represents. He argues that, had his attorneys preserved an objection to the trial court's position with respect to the jury instruction as to "accessory-after-the-fact the issue on appeal would have been simply whether petitioner had been entitled to an instruction as to that of sense. Petitioner is incorrect. The issue would have been whether the trial court erred by indicating that it would only give such an instruction if it also instructed the jury as to the definition of "accessory-before-the-fact." The resolution of this issue is not as clear cut as whether petitioner was entitled to an instruction as to "accessory-after-the-fact."

Notwithstanding petitioner's assertions to the contrary, there was certainly evidence from which the jury could conclude that petitioner was an "accessory-before-the-fact." Although the theories of neither the prosecution nor the defense had petitioner in such a role, the jury could have accepted all of petitioner's testimony as true except for his representations that he did not know of Elizabeth Haysom's intent to kill her parents when he undertook actions to establish an alibi for her in Washington, D.C, The prosecution certainly made great efforts to discredit petitioner on this very point. Moreover, the prosecution presented a great deal of evidence that petitioner and Elizabeth had formulated the plan to kill her parents prior to taking the trip to Washington, D.C. Had the instruction been given as to "accessory-before-the-fact," therefore, the prosecution could have pursued this theory of the case during closing arguments. Although it is arguable under such circumstances that an instruction as to "accessory-before-the-fact" would have been susceptible to a motion to strike because the evidence was insufficient as a matter of law, it is not at all clear under Virginia or federal law that the trial court erred in holding that it would define "accessory-after-the-fact" for the jury only if it also defined "accessory-before-the-fact," See Simms, supra.

In light of the foregoing, it would be difficult to find even that there is a reasonable likelihood that the Court of Appeals of Virginia or the Supreme Court would have found in petitioner's favor as to the propriety of the trial court's position regarding jury instructions had the issue been properly preserved for appeal. However, I need not speculate further how either of the Virginia appellate courts would have resolved the issue because, in order to demonstrate prejudice under Strickland, petitioner must show that the performance of his attorneys rendered "the result of the trial unreliable (emphasis added)." Lockhart v. Fretwell, 506 U.S. 364, 370 (1993), citing Strickland, 466 U.S. at 687; Fisher v. Angelone, 163 F.3d 835 (4th Cir,

1998). The mere fact that a criminal defendant might have prevailed can appeal if his attorneys had properly preserved particular objections does not entitle him to relief. See Thomas-Bey v. Smith, 869 F.Supp. 1214 1219-1220 (D.Md. 1994). citing id. He must also show that the incidents at trial underlying legitimate appellate issues undermined the fairness of his trial and thereby affected the outcome of the trial itself. Id. "[A]n analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective." Fretwell, 506 U.S. at 369.

In the present case, it is not reasonably probable that the trial court's failure to give a jury instruction defining "accessory-after-the-fact" affected the result of the trial itself. The jury's verdict in this case clearly constituted a wholesale rejection of petitioner's theory of the case even though the court failed to give an instruction as to the legal ramifications of such a theory. The jury necessarily rejected petitioner's theory that he was merely an "accessory-after-the-fact" to murder when it found him guilty as the "triggerman." The verdict clearly did not hinge on proof as to one or more elements distinguishing first degree murder from "accessory-after-the-fact" to that offense. The prosecution presented a case diametrically opposed to petitioner's position at trial that his only involvement in the murders of Derek and Nancy Haysom was his efforts after the fact to deflect suspicion of Elizabeth Haysom, who, in fact, committed the murders. Furthermore, counsel for both sides argued at length regarding the two diametrically opposed theories of the case even in the absence of an instruction regarding "accessory-after-the-fact." The trial court also adequately instructed the jury as to the burden of proof for each element of first degree murder and second degree murder.

In the face of a guilty verdict under the foregoing circumstances, a reviewing court would have to presume that the jury acted in a completely arbitrary and irrational fashion

to find that petitioner was prejudiced in the sense contemplated by Strickland by the lack of a jury instruction as to "accessory-after-the-fact," Given the arguments by counsel, the theories of the case and the other jury instructions regarding reasonable doubt and the elements of the offense, a reasonable jury could only have reached ct verdict of guilty as to first degree murder if it discredited petitioner's version of events, regardless of whether it received an instruction as to "accessory-after-the-fact." Not only am I unwilling to presume that the jury acted unreasonably or irrationally, but the decision in Strickland dictates against such unwarranted presumptions:

> In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury acted according to the law. An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, "nullification," and the like. A defendant has no entitlement to the luck of a lawless decisionmaker, even if the lawless decision cannot be reviewed. The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision.

Strickland, 466 U.S. at 694-695. Therefore, I am of the opinion that the Supreme Court of Virginians adjudication of subpart (5) was reasonable. Accordingly, I shall deny relief as to subpart (5).

In subpart (6), petitioner argues that his attorneys were ineffective for failing to follow proper procedure in

moving for a new trial on the basis of new evidence. Specifically, he complains that his attorneys erred in failing to bring the motion on for a hearing within twenty-one days of the final judgment and in failing to request that the judgment be vacated. Petitioner contends that he would have been entitled to a new trial on the basis of expert testimony establishing that the bloody shoe print at the scene of the crime could not have been left by him. However; as respondent argues, it is clear that this evidence would have been available to petitioner through reasonable diligence and that thus this evidence would not have entitled petitioner to a new trial. Odum v. Commonwealth of Virginia, 301 S.E.2d 145, 149 (Va. 1983). Therefore, I am of the opinion that the Supreme Court of Virginia was reasonable in concluding that petitioner did not establish ineffective assistance of counsel in subpart (6) For this reason, as well as those articulated supra, I shall deny relief as to not only subpart (6) but also claim (II) in its entirety.

Finally, in claim (III), petitioner contends that the prosecution failed to disclose exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963). During the state habeas proceedings, the Supreme Court of Virginia remanded a version of the foregoing claim in the state petition to the Circuit Court of Bedford County "for determination of the issue 'whether the Commonwealth withheld from the defense exculpatory evidence.'" Soering, 499 S.E.2d at 515, In accordance with the order of remand by the Supreme Court of Virginia, the circuit court conducted an evidentiary hearing.

After the evidentiary hearing, the circuit court determined that petitioner had established, inter alia, the following pertinent facts with respect to his claim under Brady. Within a week of the murders of which petitioner was convicted, a law enforcement officer, Deputy George Anderson, detained two men, William Shifflett and Robert Albright, in the vicinity of the City of Bedford. Shifflett and Albright, who were walking along a highway before being

detained, indicated to the officer that they had been to Lynchburg "'to see a girl'" and that they were headed to Roanoke, Shifflett and Albright were carrying a paper bag that contained what appeared to be a tablecloth and a nylon travel bag. During his detention of Shifflett and Albright, Anderson questioned the two men one at a time by placing one man in his patrol car while he asked questions of the other. Days after the incident, Anderson discovered a knife in the back seat of the patrol car. To the best of his knowledge, no one had been in the back seat of his patrol car between the time he detained Shifflett and Anderson and when he discovered the knife. Shifflett and Albright were later convicted of murdering Marvin Milliken, a street person in Roanoke. The evidence at their trial indicated that Shifflett and Albright forced Milliken to a field at knife point, made him disrobe, beat and kicked him, took his wallet and then, after leaving him in the field, returned to stab him twenty-six times and amputate his penis. Due to the shape and size of the knife recovered from Anderson's vehicle, it could not be eliminated as the weapon used to kill Derek and Nancy Haysom. The knife in question is a common type of folding knife obtainable from local department stores. The Commonwealth never disclosed to petitioner or his attorneys the circumstances surrounding Anderson's encounter with Shifflett and Albright or the subsequent discovery of the knife in Anderson's vehicle.

Before the circuit court, petitioner argued that the foregoing evidence corroborated his theory at trial that Elizabeth Haysom had enlisted the help of at least one accomplice to help her murder her parents when she left petitioner in Washington, D.C., on March 31, 1985. He maintained, in essence, that the jury might have reached a different conclusion as to his guilt if it had been presented with evidence as to the existence of two men who were in the vicinity of the murders within a week of the murders, who attempted to hide a knife from authorities that could not be eliminated as the murder weapon when detained and who

subsequently murdered another in a similar manner as the Haysoms had been murdered, The Circuit Court of Bedford County rejected this argument and denied relief as to petitioner's claim under Brady.

In reviewing petitioner's appeal of the circuit court's decision, the Supreme Court denied relief with the following reasoning:

> [S]upression by the prosecution of evidence that is favorable to an accused upon request violates due process where the evidence is material either to guilt or innocence or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland, 373 U.S. 83, 97 (1963). Favorable evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." United States v. Bagley, 473 U. S. 667, 682 [ ] (1985) Accord Kyles v. Whitley, 514 U.S. 419, 433 [-]434 [] (1995) . In other words, a petitioner must show that[,] when the case is evaluated in the context of the entire record, including the omitted evidence, a jury would have entertained a reasonable doubt regarding petitioner's guilt. See Eagley, 473 U.S. at 682 United States v. Agurs, 427 U.S. 97, 112-13 [] (1976) Accord Kyles, 514 U.S. at 460 (Scalia, J., dissenting)...
>
> ...We hold ... that [petitioner] has not established that material exculpatory evidence was withheld from his defense. Upon review of the entire record, we conclude there is no

reasonable probability that, had the evidence in question been disclosed to the defense, the result of the criminal trial would have been different. "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." Agurs, 427 U.S. at 109-10 At most, [petitioner] has established only such "mere possibility."

For example, there is no connection whatever between Albright and Shifflett and the Haysom murders. [Petitioner] only has proven that the men were present in the same county where the Haysoms were murdered near the time of the killings[] and that the vagrants may have possessed a knife that may have been similar to the one used to kill the Haysoms. As the habeas judge pointed out, "There are no confessions, no matching blood on the knife, no matching fingerprints, no stolen articles, no connection between these two men and Elizabeth Haysom... and no logical explanation as to why two drunken robbers and murderers would kill the Haysoms without taking valuables, vehicles and liquor."

Also, except for the stabbing of the victims, the Milliken and Haysom murders were dissimilar, as the habeas judge stated. The respective murders differed in motivation as well as method. The Haysom killings, committed earlier in time, involved. slashing of the victims' throats with severing of carotid arteries and jugular veins. Milliken's throat was stabbed, not slashed, and he was sexually

disfigured, a circumstances not present in the Haysom crimes. Albright and Shifflett were motivated by a desire to rob their victims. The Haysom murders were not motivated by robbery; many valuable items in plain view were left intact in the Haysom home.

Additionally, in order to entertain all reasonable doubt based on the theory that the Haysoms were murdered by Albright or Shifflett, or both, acting in concert with Elizabeth, the jury would have to disregard the overwhelming evidence. presented a t [petitioner]'s criminal trial that he alone committed the murders. For example, he confessed repeatedly in great detail, and the majority of those details fit the facts developed by the criminal investigation: the slashing of the victims' throats compatible with the manner in which he held the knife; the injuries he sustained during the violence at the time of the murders, which injuries were later observed at the funeral; the exterior lights left burning by the murderer controlled by a switch in a back bedroom, a switch unknown to a stranger to the home like [petitioner], but known to a family member like Elizabeth; and documentary evidence (letters and diary entries) implicating him in the crimes, just to mention a few of the many circumstances consistent with his confessions. Moreover, [petitioner] had a motive to kill his lover's parents, who opposed his relationship with their daughter. And, his flight to Europe after avoiding the police, resulting in the forfeiture of valuable scholarships, his also consistent with his admitted guilt.

> In sum, [petitioner] has failed to establish he is entitled to habeas relief. Confidence in the outcome his criminal trial had not been undermined.

Soering, 499 S.E.2d at 517-19. Even if I did not agree with the foregoing analysis, it is, in my view, clear that this analysis, as well as the outcome reached, is not "contrary to, or...an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C, §2254(d). Accordingly, I must deny relief as to claim (III).

For the foregoing reasons, I shall grant respondent's motion to dismiss, deny petitioner's motion for summary judgments as to certain claims and an evidentiary as to others and deny relief as to the instant petition for writ of habeas corpus. The Clerk of the Court is directed to send certified copies of this Memorandum opinion and accompanying Order to petitioner and to counsel of record for the respondents.

ENTER: This 24th day of February, 1999.

\s\ Jackson L. Kiser
Senior U.S. District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

JENS SOERING, Petitioner,	)	Civil Action No. 98-0361-R
V.	)	Order
GEORGE DEEDS, Respondent,	)	By: Jackson L. Kiser Senior U.S. District Judge

Entered: February 24, 1999

In accordance with the written Memorandum opinion entered this day, it is hereby ADJUDGED and ORDERED as follows:

1) that petitioner's motion for summary judgment as to claims (I) and (III) be and hereby is DENIED;

2) that petitioner's motion for an evidentiary hearing as to claim (II) and his motion for oral arguments on this issue be and hereby are DENIED;

3) that respondent's motion to amend the brief in support of his motion to dismiss be and hereby is GRANTED;

3) that the respondents' motion to dismiss be and hereby is GRANTED;

4) that the present petition for writ of habeas corpus be and hereby is DENIED.

This case will be stricken from the active docket of the court, The Clerk of the Court is directed to send certified copies of order to petitioner and to counsel of record for the respondents.

ENTER: This 24th day of February, 1999.

\s\ Jackson L. Kiser
Senior U.S. District Judge

Present: All the Justices

JENS SOERING

v. Record No. 971647

GEORGE DEEDS, WARDEN,
KEEN MOUNTAIN CORRECTIONAL CENTER

OPINION BY
JUSTICE A. CHRISTIAN COMPTON

Entered: April 17, 1998

FROM THE CIRCUIT COURT OF BEDFORD COUNTY
William W. Sweeney, Judge

Petitioner Jens Soering was convicted in 1990 by a jury in the Circuit Court of Bedford County of two counts of first degree murder for the 1985 killings of Derek Haysom and Nancy Haysom in their Bedford County home near Lynchburg. Soering is being detained by the respondent under two terms of life imprisonment for the murders.

In 1995, the convict filed a petition for a writ of habeas corpus invoking the original jurisdiction of this Court. In August 1996, the Court, pursuant to Code § 8.01-657, awarded the petitioner a writ of habeas corpus returnable to the Circuit Court of Bedford County for determination of the issue "whether the Commonwealth withheld from the defense exculpatory evidence as alleged in claim V" of the amended petition. The Court dismissed the remaining habeas allegations. Claim Five of the petition alleges: "Soering's conviction should be reversed due to the

prosecution's withholding of Brady material from the defense at his original trial."

In December 1996, the habeas judge, who had presided over the criminal trial, conducted an evidentiary hearing on the issue presented. In a June 1997 order, incorporating a 13-page memorandum opinion, the court determined the convict's claim is without merit. The matter is before us for review.

Initially, the evidence adduced during the criminal trial will be summarized. The murder victims were the parents of Elizabeth Haysom, Soering's girlfriend and lover. In 1984, Soering and Elizabeth were undergraduate students at the University of Virginia, both attending under academic scholarships. A friendship between the pair developed into an infatuation. Elizabeth's parents opposed their daughter's relationship with Soering; this infuriated him. During this time, she also had "feelings" of "anger" as well as "resentment" and "hatred" toward her parents.

During the latter part of 1984 and early 1985, Soering and Elizabeth began discussing "a lot of ideas about how [her parents] might die." On Friday, March 29, 1985, the students traveled in a rented vehicle from Charlottesville to Washington, D.C., and "checked into" a hotel.

On Saturday, "it suddenly became real, we were going to conspire and commit murder," according to Elizabeth, who was a prosecution witness at Soering's trial. The pair made elaborate plans to establish an alibi to cover Soering's trip from Washington to her parents' home for the purpose of killing them. He purchased a knife before he departed Washington alone on Saturday afternoon. She remained, and walked around Washington in a drug-induced "haze."

Later that night, Elizabeth found Soering on a Washington street, near where they "agreed to meet," sitting in the rented vehicle with a bloody bedspread "draped over him." He told her he had killed her parents.

The victims' bodies were discovered during the day on Wednesday, April 3. Her body was found on the kitchen floor and his body was on the floor between the dining room and living room. They had been stabbed in their torsos and their throats had been cut. There were no signs of forced entry into the home. Exterior lights were burning, but interior lights were not. Efforts had been made to wipe footprints left in the blood at the scene. All fingerprints at the scene had been left by known friends or visitors, except four sets that never were identified. No murder weapon was ever found.

No valuables had been removed from the home. Silverware, cash, and jewelry in plain view had not been touched. The contents of a liquor cabinet were undisturbed. The Haysoms' motor vehicles were parked outside and a set of car keys was found in the hallway.

Subsequently, the police investigation focused on Elizabeth, who voluntarily furnished blood and hair samples, fingerprints, and footprints. The police had learned about the pair's rental of the vehicle and that the miles the car was driven far exceeded the round trip distance from Charlottesville to Washington. In fact, the mileage was consistent with a trip from Charlottesville to Washington, Washington to Bedford and back, then from Washington to Charlottesville.

The police were unable to contact Soering until October 1985. Initially, he refused to provide blood or hair samples, fingerprints, or footprints, but later agreed to meet investigators to provide the requested forensic information. Before the appointed time, however, Soering fled to Europe, leaving school and forfeiting scholarships that provided full tuition and expenses. Shortly thereafter, Elizabeth fled and met Soering in Europe.

In 1986, the Bedford police learned the pair had been arrested and were incarcerated in London on various fraud charges. British police had searched the pair's apartment

and found documentary evidence linking them to the murders.

During interrogation in jail in London, Soering confessed in detail on several occasions to having committed the murders. He said he had traveled alone from Washington to Bedford, leaving Elizabeth in Washington to establish an alibi for him. Upon arriving at the Haysoms' home, he stated, he conversed with them over dinner at the dining room table, violence erupted, and he killed them both by stabbing and cutting their throats. He demonstrated to the police the manner in which their throats were cut.

Soering stated to the police that during the killings he cut two fingers of his left hand and that Mr. Haysom had struck him in the face. A witness testified that, at the victims' funeral, Soering had bandages on his fingers and a bruise on his face.

Soering's blood type proved to be Type "O," the same type as unidentified blood found at the murder scene. Neither the victims' blood nor Elizabeth's blood was Type "O." His fingerprints did not match any of the four sets of unidentified prints found at the scene.

Soering testified at the criminal trial. He denied any participation in the planning or commission of the murders. He testified that Elizabeth left the hotel in the rented vehicle, telling him she had to procure some drugs while in Washington because she was being blackmailed by another student, her Charlottesville drug supplier, who threatened to tell her parents of her continued drug use. According to Soering, Elizabeth returned to the hotel room after midnight, stating, "I have killed my parents."

Elizabeth pled guilty as an accessory before the fact to both murders. She was sentenced to 90 years in prison.

We turn to the evidence presented at the habeas hearing. The convict showed that, prior to the criminal trial, his attorney filed a comprehensive discovery motion for "any and all evidence or information within the possession, custody, or control" of the prosecution "which is or might

arguably be exculpatory," including information "which may tend to show that there are other individuals responsible for" the crimes.

The focus of the 1996 evidentiary hearing was the testimony, presented on behalf of the convict, of former Bedford County Deputy Sheriff George Anderson. Within a week of the Haysom murders, Anderson detained and questioned two men, William Shifflett and Robert Albright, who were walking or hitchhiking late at night on the Route 460 East bypass near Bedford. The officer became suspicious of the men because he rarely had seen persons walking there late at night. The men told Anderson they had been to Lynchburg "to see a girl" and were headed to Roanoke.

Anderson directed each of the men to place the contents of his pockets on the hood of the patrol car, and then questioned each of them while the other sat in the rear of the car. One of the men carried a small beige tablecloth and a small, empty, nylon travel bag. Neither carried any large amount of money nor did there appear to be bloodstains on them or their belongings. There was no testimony that the tablecloth or bag were items missing from the Haysom home.

Anderson reported by radio the encounter to the Bedford Sheriff's Office and was told by a superior to release the men. Anderson discussed the incident the next day with another superior officer, who was involved in the Haysom investigation.

Ten days to two weeks after this incident, Anderson noticed the brass end of an object protruding from the rear seat of his patrol car. He found a Buck 110 folding knife. The knife had not been among the belongings the two men produced when Anderson stopped them on the bypass. Anderson did not recall that anyone else had been in the rear seat of his car after he stopped Shifflett and Albright, although he could not recall when, before the bypass incident, he previously had examined the seat.

Prior to the habeas hearing, the knife Anderson discovered was subjected, pursuant to the convict's request, to laboratory testing for traces of blood. There was no evidence that any blood was found on the knife.

The medical examiner who performed the Haysom autopsies testified that the blade of the knife was of such size and shape that it could have been the Haysom murder weapon, although he said it was difficult to be certain of that fact because he could not determine precisely the dimensions of the blade of the murder weapon from the wounds on the bodies. The knife, a common type of folding knife, is readily available at retail stores.

On the night of April 5, Albright and Shifflett stayed under a bridge in Roanoke. The next day, in a drunken condition and after accosting and attempting to rob two persons, the duo met Marvin Millikin, a street person. They forced Millikin at knife point to a field, made him disrobe, beat and kicked him, and took his wallet. After leaving him in the field, they returned, stabbed him 26 times, and amputated his penis. Later, they were convicted of Millikin's murder.

Deputy Anderson learned of the arrests of Albright and Shifflett for the Millikin murder and began to suspect they might have been involved in the Haysom murders. He notified the Roanoke police of his suspicions.

No evidence was presented that Albright or Shifflett admitted any connection with the Haysom murders, nor was there any evidence that Elizabeth Haysom ever met or had any connection with either of the men. According to the record, the Roanoke police apparently did not make any connection between the Haysom and Millikin murders.

During Soering's prosecution, the Commonwealth never disclosed to the defense any circumstances of the Albright and Shifflett stop or the later discovery of the knife in Anderson's patrol car.

Upon review, the convict says there is no dispute the prosecution withheld evidence and no dispute "what the

evidence was." He contends that the withheld evidence was exculpatory as a matter of law and that his convictions must be vacated.

The theory of Soering's defense was "that the crimes were committed by Elizabeth, with one or more accomplices." He argues, "It was established at the evidentiary hearing that the possibility of an accomplice to work with Elizabeth, and some suggestion as to who that might have been, was critically important to the defense of this case because of a jury's natural reluctance to find that a child, even an adult child, could commit this brutal crime on her own parents. This is even more true where, as here, the family involved was a 'nice' family, well known and respected, with money, educational benefits and social prominence."

He contends, "This evidence – concerning the presence of two men in the area of the crime, soon after the crime was committed, who were known criminals, indeed murderers, and who when stopped attempted to hide from authorities a knife which is consistent with being the murder weapon, and who [were] never interrogated about the Haysom crimes nor had their hair or blood samples compared with crime scene samples – was clearly exculpatory." We do not agree.

"[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady v. Maryland, 373 U.S. 83, 87 (1963). Favorable evidence is material "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." United States v. Bagley, 473 U.S. 667, 682 (1985). Accord Kyles v. Whitley, 514 U.S. 419, 433, 434 (1995). In other words, a petitioner must show that when the case is evaluated in the

context of the entire record, including the omitted evidence, a jury would have entertained a reasonable doubt regarding petitioner's guilt. See Bagley, 473 U.S. at 682; United States v. Agurs, 427 U.S. 97, 112-13 (1976). Accord Kyles, 514 U.S. at 460 (Scalia, J., dissenting).

Additionally, evidence that is inadmissible at trial is not "evidence" at all, for Brady purposes. Wood v. Bartholomew, 516 U.S. 1, 5-6 (1995). Thus, it is not "reasonably likely" that disclosure of such information would result in a different outcome at trial. Id. at 8.

Urging denial of the habeas petition, the Attorney General contends that "the information concerning Albright and Shifflett would not have been admissible at Soering's trial." Evidence proffered by an accused that merely suggests a third party may have committed the crime charged is inadmissible; only when the proffered evidence tends clearly to point to some other person as the guilty party will such proof be admitted. Karnes v. Commonwealth, 125 Va. 758, 766, 99 S.E. 562, 565 (1919). Accord Oliva v. Commonwealth, 19 Va. App. 523, 527, 452 S.E.2d 877, 880 (1995). Although we have considerable doubt of the correctness of the convict's argument on this issue, we will agree with him for the purpose of this discussion and assume, without deciding, that the evidence would have been admissible at his trial.

We hold, however, that the convict has not established that material exculpatory evidence was withheld from his defense. Upon review of this entire record, we conclude there is no reasonable probability that, had the evidence in question been disclosed to the defense, the result of the criminal trial would have been different. "The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." Agurs, 427 U.S. at 109-10. At most, the convict has established only such "mere possibility."

For example, there is no connection whatever between Albright and Shifflett and the Haysom murders. The convict only has proven that the men were present in the same county where the Haysoms were murdered near the time of the killings, and that the vagrants may have possessed a knife that may have been similar to the one used to kill the Haysoms. As the habeas judge pointed out, "There are no confessions, no matching blood on the knife, no matching fingerprints, no stolen articles, no connection between these two men and Elizabeth Haysom . . . and no logical explanation as to why two drunken robbers and murderers would kill the Haysoms without taking valuables, vehicles and liquor."

Also, except for the stabbing of the victims, the Millikin and Haysom murders were dissimilar, as the habeas judge stated. The respective murders differed in motivation as well as method. The Haysom killings, committed earlier in time, involved slashing of the victims' throats with severing of carotid arteries and jugular veins. Millikin's throat was stabbed, not slashed, and he was sexually disfigured, a circumstance not present in the Haysom crimes. Albright and Shifflett were motivated by a desire to rob their victims. The Haysom murders were not motivated by robbery; many valuable items in plain view were left intact in the Haysom home.

Additionally, in order to entertain a reasonable doubt based on the theory that the Haysoms were murdered by Albright or Shifflett, or both, acting with Elizabeth, the jury would have to disregard the overwhelming evidence presented at Soering's criminal trial that he alone committed the murders. For example, he confessed repeatedly in great detail, and the majority of those details fit the facts developed by the criminal investigation: the slashing of the victims' throats compatible with the manner he said he held the knife; the injuries he sustained during the violence at the time of the murders, which injuries were later observed at the funeral; the exterior lights left burning by the murderer

controlled by a switch in a back bedroom, a location unknown to a stranger to the home like Soering, but known to a family member like Elizabeth; and documentary evidence (letters and diary entries) implicating him in the crimes, just to mention a few of the many circumstances consistent with his confessions. Moreover, Soering had a motive to kill his lover's parents, who opposed his relationship with their daughter. And, his flight to Europe after avoiding the police, resulting in the forfeiture of valuable scholarships, is also consistent with his admitted guilt.

In sum, the convict has failed to establish he is entitled to habeas relief. Confidence in the outcome of his criminal trial has not been undermined.

Therefore, the judgment of the habeas court will be affirmed and the petition for a writ of habeas corpus will be denied.

Affirmed and writ denied.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 99-6498
CA-38-361-R

JENS SOERING

Petitioner – Appellant

v.

GEORGE DEEDS, Warden,
Keen Mountain Correctional Center

Respondent – Appellee

Filed: July 25, 2000
Entered: July 25, 2000

On Petition for Rehearing and Rehearing En Banc

The appellant's petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

/s/ Patricia S. Connor
Clerk